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RIGHTS, REMEDIES, AND PRACTICE.

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RIGHTS, REMEDIES,

AND

PRACTICE,

AT LAW, IN EQUITY, AND UNDER THE CODES.

A TREATISE ON

AMERICAN LAW

IN CIVIL CAUSES;

WITH

A DIGEST OF ILLUSTRATIVE CASES.

BY

JOHN D. LAWSON,

AUTHOR OF WORKS ON PRESUMPTIVE EVIDENCE, EXPERT EVIDENCE, CARRIERS,
USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC.

IN SEVEN VOLUMES.

VOL. I.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1889.

P-49
R-26
P-149
-206

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PREFACE.

THE work which I now offer to the consideration and judgment of the profession is a somewhat ambitious attempt to present a complete view of American case law on every species of right and remedy, of action and defense, both at law and in equity, within the compass of a single work, and under the direction of one hand. It aims to cover the entire field of jurisprudence, except criminal law, logically, methodically, thoroughly, and yet without such diffuseness as to unduly extend the work. It is not only a digest of points decided, but a treatise showing all the various branches of the civil law as a whole, and their bearing on and relations to each other; and it includes also all the practical features of a digest. Preserving the scientific arrangement of a text-book, it adds to this a full collection of the actual results of decided cases on their facts, as illustrations of the principles of the text.

What, it may be asked here by the reader,—what of the law-books already on our shelves? Do they not sufficiently cover the field? The answer to this very pertinent query is, that the development of our American law, with its thousands of volumes of reported cases, has rendered the commentaries of its early days insufficient for the present needs of the profession, while the hundreds of text-books and digests upon distinct titles and

subdivisions of titles have failed to fill the place which the commentary then occupied. The statement of general principles in the commentary is now too meager, and requires too much of historical explanation, while the treatise upon a special topic is too detailed.

In the firm belief that there is abundant room for an intermediate work, which shall state full enough for all practical purposes the principles of the law as established by the judicial decisions and the statutes, and shall at the same time give ample illustrations of the applications of those principles to the facts of the particular cases, this work, the labor of many years, is submitted to the judgment of the profession. I ask the critic not to lose sight of this idea, viz.: that it is first of all a work for the practitioner, prepared on the theory that the lawyer of the present day needs in his daily practice some work which treats all the important titles of the law. Its endeavor is to present a substitute for a complete collection of text-books; to be in itself a working library.

No space is wasted in showing the development of our common law, its history, or what it has been, but the law is given as it exists to-day in the American reports and statutes, with the important advantage of bringing all of its topics down to the present time, to the last judicial decision and the latest legislative law. The work covers the field of law, equity, and American code law.

Whatever difference of opinion there may be as to the propriety or utility of citing all the decided cases on a given point in a text-book on a single subject, it is clear that in a work so extensive as this, such a thing is out of the question. Nevertheless, the citation of authorities

is very full, and none of the leading or best considered cases have been omitted,—none of such cases as have been and are being preserved in the American Decisions, the American Reports, and American State Reports.

The work is arranged in four divisions, viz.:—

DIVISION I. PERSONS AND PERSONAL RIGHTS.—Under this division are the subjects of principal and agent; attorney and client; auctioneers, brokers, and factors; master and servant; corporations in general; different classes of corporations; banks; railroads; gas companies; building and loan associations; voluntary associations; clubs and societies; religious societies and corporations; charitable associations; partnership; husband and wife; parent and child; guardian and ward; executors and administrators.

DIVISION II. PERSONAL RIGHTS AND REMEDIES.—Under this division are personal wrongs and torts; conspiracy; assault and battery; false arrest and imprisonment; malicious prosecution; torts in domestic relations; seduction; *crim. con.*; negligence; slander and libel.

DIVISION III. PROPERTY RIGHTS AND REMEDIES.—Under this division are personal property; gifts; animals; copyright; trade-marks; patents; negotiable instruments; ships and shipping; bailments; pledges; innkeepers; carriers; railroads; telegraph companies; physicians and surgeons; contracts; liens; mortgages; insurance; real property; waters and watercourses; easements; licenses; landlord and tenant; fixtures; trusts and trustees; nuisances.

DIVISION IV. PUBLIC RIGHTS AND REMEDIES.—Under this division are constitutional law; taxation; emi-

nent domain; municipal corporations; public offices and officers; schools; elections; conflict of laws.

And each division contains a statement of the remedies for the breach of each particular right, and the forms of procedure and practice in obtaining the relief or in resisting the action.

The American text-books on the different branches of the law are very numerous. Yet it will be found that while on some of these branches the writers have been very diligent, others have been all but neglected. There are what I may term favorite topics upon which nearly every writer has tried his hand; there are others, again, on which none has cared to venture, or if he has essayed them at all, he has by no means attempted to exhaust them. In preparing the different titles of my work, where I have discovered that the text-books could give me very little assistance or none at all, I have gone into the reports more fully than in other cases, and as a result, these titles in my book will be found, I think, of peculiar value. A sufficient index for the purpose of reference is at the end of each volume. But at the completion of the work there will be issued a comprehensive index to every point contained in any of the volumes.

J. D. L.

SAN FRANCISCO, October, 1889.

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¹ Parts II. to VIII. will be found in the second volume.

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TITLE I.

PRINCIPAL AND AGENT.

PART I.—LAW OF AGENCY IN GENERAL

1. THE CONTRACT OF AGENCY.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

- § 1. Agency defined and divided.
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§ 1. **Agency Defined and Divided.**—An agent is one who, being legally qualified to so act, is duly authorized to act on behalf of another in a future legal matter, or whose unauthorized act has been duly ratified. The person from whom the authority is derived is called the principal. To constitute a valid agency, where property is its subject, it is not essential that the principal should hold the legal or equitable title, or more than a naked claim of title. It may be created for the acquisition of title, either legal or equitable, or for the protection of an asserted title.¹ An agency is either general or special. A general agent is one who is authorized to transact all the business of his principal, or all his business of a particular kind; a special agent is one who is authorized to

¹ *Hardenbergh v. Bacon*, 33 Cal. 356.

act only in a particular transaction.¹ But "the only difference in doctrine arising out of this distinction is, that all the restrictions upon the authority of the special agent take effect; while in the case of a general agent, all acts embraced in the delegation are valid as to third parties, though directly opposed to private instructions."² The rights and liabilities of principal and third persons as to the acts of general and special agents respectively are discussed in a succeeding chapter.³

§ 2. Different Classes of Agents.—The principal classes of agents are ATTORNEYS, AUCTIONEERS, BROKERS, FACTORS, and PARTNERS. An attorney is either in fact or in law. An agent is broadly one who is employed to do any act *in pais* for another, or by authority of deed. It may be said to be a generic name, including all classes of agents. Attorneys in fact act under special power created by deed; the term "agent" including all classes of agents, an agent is not necessarily an attorney in fact, though an attorney in fact is an agent.⁴ An attorney in law—or better, *at law*—is a person empowered with the management of suits or controversies in courts of law.⁵ An auctioneer is a person authorized to sell goods or merchandise at public sale.⁶ A broker is an agent employed to make bargains and contracts between other persons in matters of trade or commerce.⁷ A factor or a commission

¹ "A special agency properly exists when there is a delegation of authority to do a single act. A general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment. Thus a person who is authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. But a person who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business, or employment is

a general agent in that trade, business, or employment": Story on Agency, sec. 17.

² *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 148; 69 Am. Dec. 678.

³ Chapter VIII., on the Authority of the Agent.

⁴ *Porter v. Hermann*, 8 Cal. 619.

⁵ See Part II., Attorneys, *post*.

⁶ See Part III., Auctioneers, *post*.

⁷ See Part IV., Brokers and Factors, *post*. "A broker," says Tindal, C. J., "is one who makes a bargain for another, and receives a commission for so doing": *Pott v. Turner*, 6 Bing. 702.

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merchant—the terms are synonymous¹—is an agent em-
ployed to sell goods consigned or delivered to him.² A *del*
credere agent is one—usually a factor—who guarantees
the responsibility and engagements of those to whom he
sells.³ Partners are agents of each other in the partner-
ship business.⁴

¹ Perkins v. State, 50 Ala. 154.

² See Part IV., Brokers and Factors, *post.*

³ See Part IV., Brokers and Factors,

⁴ See Title III., Partnership, *post.*

CHAPTER II.

PARTIES TO THE CONTRACT.

- § 3. All persons *sui juris* may be principals.
- § 4. Idiots, lunatics, infants, married women.
- § 5. Alien enemies, convicts.
- § 6. All persons may be agents.
- § 7. Persons having adverse interests. (See *post*, Part I., Chapter IX.)
- § 8. Doing of unlawful acts—Personal acts. (See *post*, Part I., Chapter V.)

§ 3. **All Persons Sui Juris may be Principals.**—Whatever, as a general rule, a person may legally do himself he may legally do by the hand of another,¹ and therefore only those under a legal disability are incapable of being principals.² Infants, idiots, lunatics, and married women are to some extent under legal disability, and constitute an important exception to the general rule.

§ 4. **Idiots, Lunatics, Infants, Married Women.**—Idiots, lunatics, and persons *non compos mentis* are wholly incapable of appointing agents.³ An infant cannot legally appoint an agent,⁴ except, it seems, where the business to be done is to the infant's interest.⁵ By the common law,

¹ A county offers a reward for the apprehension of a thief. B employs another person to pursue and capture the thief, paying all the expenses, and the thief is apprehended by him. The county is liable to B for the reward: *Montgomery County v. Robinson*, 85 Ill. 174, and see *Sherley v. Riggs*, 11 Humph. 53. The maker of a note can authorize another to sign his name to it: *Coy v. Stiner*, 53 Mich. 42; *Weaver v. Carnall*, 35 Ark. 198; 37 Am. Rep. 22.

² *Coombe's Case*, 9 Coke, 756; *Lee v. Bringier*, 19 La. Ann. 197.

³ *Story on Agency*, sec. 6. In England, by recent decisions, if the principal's unsoundness of mind be unknown to the other party, the disability will not void the contract where it has been partly or wholly executed, and no advantage has been

taken of him: *Molton v. Camroux*, 4 Ex. 17; and see *Evans on Agency*, 11.

⁴ *Bennett v. Davis*, 6 Cow. 393; *Fetrow v. Wiseman*, 40 Ind. 148; *Vaughan v. Parr*, 20 Ark. 608; *Lawrence v. McArthur*, 10 Ohio, 37; *Ferguson v. Bell*, 17 Mo. 351; *Cummings v. Powell*, 8 Tex. 90; *Whitney v. Dutch*, 14 Mass. 402; 7 Am. Dec. 229; *Chapin v. Shaffer*, 49 N. Y. 412; *Hiestou v. Kuns*, 8 Blackf. 345; 46 Am. Dec. 481; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77. An infant, it has been held, cannot ratify what he cannot authorize: *Armitage v. Widoe*, 36 Mich. 124. But see *Ward v. Steamboat*, 8 Mo. 358.

⁵ *Wharton on Agency*, sec. 812; *Evans on Agency*, 13; *Story on Agency*, sec. 6. Where the power given is one coupled with an interest, it is voidable only, and not void: *Duval v. Graves*, 7 Bush, 461.

a married woman could not make a valid business contract, and therefore could not appoint an agent.¹ But in modern times, by statute, *femes covert* have been given power to contract in their own names, and whatever they now may do by themselves, it must be conceded they may appoint another to do for them.²

§ 5. **Alien Enemies, Convicts.**—And alien enemies³ and convicts⁴ seem to be incapable of appointing agents.

§ 6. **All Persons may be Agents.**—On the other hand, as a rule any one may be an agent, and the incapacities to being principals do not extend to being appointed agents.⁵ “The reason given for this distinction between principals and agents is, that the execution of a naked authority can be attended with no manner of prejudice to the persons under such incapacities or disabilities as are involved in infancy and the rest, or to any other person who by law may claim any interest of such disabled persons after their death.”⁶ Therefore an infant may be an agent,⁷ and so may a married woman be the agent of a third person,⁸ or of her husband;⁹ a husband may be the agent of his wife;¹⁰ in slavery times, a slave might be his master’s

¹ Marshall v. Rutton, 8 Term Rep. 545; Lewis v. Lee, 3 Barn. & C. 291; Snyder v. Sponable, 1 Hill, 567.

² Wharton on Agency, sec. 811, note.

³ Evans on Agency, 16.

⁴ Evans on Agency, 16.

⁵ Lyon v. Kent, 45 Ala. 656.

⁶ Evans on Agency, 17. A principal who knowingly acts through an incompetent agent, and is sued, cannot set up the invalidity of the agency in an action on the case, though he might to a suit brought on a void contract of agency: Wharton on Agency, sec. 17.

⁷ Talbot v. Bowen, 1 A. K. Marsh. 430; 10 Am. Dec. 747; Brown v. Hartford Ins. Co., 117 Mass. 479.

⁸ Story on Agency, sec. 7. Infants or *femes covert* cannot be attorneys to prosecute suits, nor to execute a power

coupled with an interest: Hearle v. Greenbank, 3 Atk. 695. But see Bradish v. Gibbs, 3 Johns. Ch. 525.

⁹ Follows v. Emerson, 16 Vt. 653; Cantwell v. Calwell, 3 Head, 471; Pickering v. Pickering, 6 N. H. 124; Mackinley v. McGregor, 3 Whart. 369; 31 Am. Dec. 522; Edgerton v. Thomas, 9 N. Y. 40; Hopkins v. Mollineux, 4 Wend. 465; Singleton v. Mann, 3 Mo. 465; Marselis v. Seaman, 21 Barb. 319; Lang v. Waters, 47 Ala. 624; Stall v. Meek, 70 Pa. St. 181; Benjamin v. Benjamin, 15 Conn. 347; 39 Am. Dec. 385.

¹⁰ Read v. Bragg, 1 Head, 511; Rowell v. Klein, 44 Ind. 291; 15 Am. Rep. 235; McLaren v. Hall, 26 Iowa, 297; Knapp v. Smith, 27 N. Y. 277; Woodworth v. Sweet, 51 N. Y. 8; Buckley v. Wells, 33 N. Y. 518.

agent;¹ a corporation may be the agent of an individual;² a father may be his son's agent,³ or a son may be his father's.⁴ An alien enemy may be an agent⁵ for the purpose of attending to the property of his absent principal when a war comes on. Thus it was held that an agent intrusted with the management of real estate in New Orleans, belonging to a resident of the North before the war, continued to be his agent during the time of the war.⁶ But during the existence of a war between two countries or states, no agent can be appointed by a citizen of one government to act in the territory of the other. "There is no power to appoint an agent for any purpose after hostilities have actually commenced."⁷

§ 7. **Persons having Adverse Interests.**—A person having an adverse interest cannot act as an agent in the transaction.⁸ Therefore one person cannot be the agent of both parties,⁹ the interests being adverse or incompatible. This is the limit to the rule. "The authority of agents may, when no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under powers from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries by a surveyor jointly agreed upon

¹ *Chastain v. Bowman*, 1 Hill (S. C.), 270; *Governor v. Daily*, 14 Ala. 469.

² *McWilliams v. Detroit Mills Co.*, 31 Mich. 274.

³ *Reeves v. Kelly*, 30 Mich. 132.

⁴ *Chase v. Snow*, 52 Vt. 525; *Commonwealth v. Holmes*, 119 Mass. 195.

⁵ *Sands v. Ins. Co.*, 59 Barb. 556; *Conn v. Penn*, 1 Pet. C. C. 523; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *Griswold v. Waddington*, 16 Johns. 486; *Hale v. Wall*, 22 Gratt. 424; *Yeaton v. Berney*, 62 Ill. 61; *Bank v. Matthews*, 49 N. Y. 12; *Ward v. Smith*, 7 Wall. 447; *University v. Finch*, 18 Wall. 106; *Robinson v. Ins. Co.*, 42 N. Y. 54; 1 Am. Rep. 490; *Furman v. United States*, 5 Ct. of Cl.

579; *Montgomery v. United States*, 5 Ct. of Cl. 648; *Stoddard v. United States*, 6 Ct. of Cl. 340; *Mousseux v. Urquhart*, 19 La. Ann. 482; *Lyon v. Kent*, 45 Ala. 656. Other cases hold that war revokes an agent's authority: *Howell v. Gordon*, 40 Ga. 302; *Couley v. Benson*, 1 Heisk. 145.

⁶ *Mousseux v. Urquhart*, 19 La. Ann. 482; and see *Manhattan Ins. Co. v. Warwick*, 20 Gratt. 614; 3 Am. Rep. 218.

⁷ *United States v. Grossmayer*, 9 Wall. 72; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562.

⁸ *Bain v. Brown*, 56 N. Y. 285.

⁹ *Hinckley v. Arey*, 27 Me. 362.

would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal that the law requires peculiar safeguards against his acts."¹ When, therefore, the double agency is with the consent of the principals it is valid.² In making a contract for the composition of a debt, while the same person cannot be the agent of both parties, yet when the composition is agreed upon with the creditor by the agent of the debtor, he can become the agent of the creditor for another and distinct purpose, as holding the money for the use of the creditor.³ A contract made by an agent for both parties is not void,—it is simply voidable at the election of the principal;⁴ and in coming into court to avoid it, he is not obliged to show injury or an improper advantage gained over him,—it is his option to repudiate it irrespective of proof of actual fraud.⁵ An agent cannot in the same transaction act both for himself and for his principal.⁶ One of the parties to a contract cannot be the agent of the other for the purpose of signing it.⁷ Thus the seller of land cannot act as agent for the purchaser so as to bind him by any memorandum he may make and sign himself.⁸

ILLUSTRATIONS.—A employed C, who was depot agent of the R. railroad, to purchase cotton for him, and hold and ship it. Some of the cotton was damaged on the R. railroad. In an

¹ Adams Mining Co. v. Senter, 26 Mich. 73; Colwell v. Keystone Iron Co., 36 Mich. 51.

² See *post*, Duties and Liabilities of Agents.

³ Hinckley v. Arey, 27 Me. 362.

⁴ Greenwood v. Spring, 54 Barb. 375. An agent employed to sell land may recover compensation from his employer, although, with the knowledge of the latter, he has affixed the purchaser's name to the contract of sale; Barry v. Schmidt, 57 Wis. 172; 46 Am. Rep. 35.

⁵ Greenwood v. Spring, 54 Barb. 375; Gillett v. Peppercorne, 3 Beav. 78.

⁶ Neuendorff v. World Life Ins. Co.,

69 N. Y. 389. An agent cannot bind his principal to the receipt of money due from himself by a mere acknowledgment signed by himself as agent that he had received it; Neuendorff v. World Life Ins. Co., 69 N. Y. 389. A bank president given power to certify checks cannot certify his own checks; Titus v. Great Western Turnpike Road, 5 Lans. 250; New York etc. R. R. Co. v. Schuyler, 34 N. Y. 61; Claflin v. Farmers' Bank, 25 N. Y. 293.

⁷ Wright v. Dannah, 2 Camp. 203.

⁸ Adams v. Scales, 57 Tenn. 337; 25 Am. Rep. 772. See *post*, Duties and Liabilities of Agents.

action for damages, *held*, that C, in the transaction, could only be A's agent, and the railroad could not be liable for his acts or bound by them: *Sumner v. Charlotte etc. R. R. Co.*, 78 N. C. 289. A person stands in the position of agent for both A and B. He cannot execute a mortgage as attorney for A for the benefit of B: *Greenwood v. Spring*, 54 Barb. 375. A stock-broker employed to buy canal shares purchased the shares from his own trustee. *Held*, void: *Gillett v. Peppercorne*, 3 Beav. 78.

§ 8. Doing of Unlawful Acts — Personal Acts. — An agent cannot be appointed to do an unlawful or prohibited act,¹ or an act personal in its nature.²

¹ *Heugh v. Abergavenny*, 23 Week. Rep. 40. *parte* *Agra Bank*, L. R. 6 Ch. 206. See Chapter V., Delegation of Authority,

² *Coombe's Case*, 9 Coke, 766; *Ex post.*

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CHAPTER III.

THE APPOINTMENT OF AGENTS.¹

- § 9. Authority essential to agency.
- § 10. May be conferred by parol.
- § 11. Or implied from acts.
- § 12. Declarations of agent.
- § 13. Authority to execute instrument under seal.
- § 14. Same—Principal present.
- § 15. Unsealed writings.
- § 16. Statute of frauds.
- § 17. Agents of corporations. See Title II., Corporations.

§ 9. **Authority Essential to Agency.**—One cannot become another's agent except by his authority, express or implied.² The relation of principal and agent cannot be established by evidence of dealings between the alleged agent and a third person which the alleged principal has neither authorized nor ratified, but which he expressly repudiates. Testimony of such transactions is irrelevant.³ A denial by an alleged principal of the existence of any agency operates to destroy the effect of previous circumstances to establish any agency existing by implication prior to the inquiry eliciting such denial. Such circumstances are then admissible only to explain the import of his answer.⁴ An interpreter is not necessarily an agent of the parties, so that what he said can be given in evidence if the party sought to be charged by his declarations had no knowledge of the language in which they were made, unless accompanied with proof that the interpreter correctly interpreted the language of the party.⁵ To make a letter to an agent evidence in a case, the agency must

¹ As to appointment of agents of corporations, see Title II., Corporations. 52 N. Y. 612; *Bereich v. Marye*, 9 Nev. 312.

² *Stringham v. St. Nicholas Ins. Co.*, 5 North v. Metz, 57 Mich. 612.

⁴ Abb. App. 315; *Pole v. Leask*, 8 Norton v. Richmond, 93 Ill. 367.

L. T. Rep. 645; *McGoldrick v. Willits*, 5 Diener v. Schley, 5 Wis. 483.

first be established.¹ One who buys exchange for a principal is the agent of that principal, and not of the seller of the exchange.²

ILLUSTRATIONS.—Without proof of agency, a warranty of a grass-cutting machine, signed "A B, agent," was offered and received in evidence in an action upon the warranty. *Held*, that this was erroneous: *Gray v. Gillilan*, 15 Ill. 453. The plaintiff having sold and delivered to the defendants granite blocks, which they refused to accept, on the ground that the blocks were of dimensions different from those for which they had contracted, and a dispute having thus arisen, the plaintiff wrote to the defendants a letter containing the following passage: "I have seen E., and he has consented to see you on the subject of the granite, and I have authorized him to do so, and if possible come to some amicable arrangement in the matter." Shortly afterwards E. went to the defendants, and, on behalf of the plaintiffs, agreed with them that on payment of fifty pounds the granite should be theirs, and no further claim in respect of it made by the plaintiff. The plaintiff repudiated the agreement made by E., and sued the defendants for the price of the granite. *Held*, that the plaintiff's letter to the defendants constituted E. his agent, with power to make the agreement which in fact he did make, and that the plaintiff was therefore bound by it: *Trickett v. Tomlinson*, 13 Com. B., N. S., 663; 7 L. T., N. S., 678. B employed C to raise money, and C procured one hundred and sixty pounds from A, which he handed to B, from whom he took a check for that sum, payable to him (C) or bearer. C subsequently applied to B for payment of the check. In an action by A against B on the check, *held*, that C was clearly B's agent, and that delivery to him supported the averment in the declaration of a delivery to A: *Samuel v. Green*, 10 Q. B. 262; 11 Jur. 607; 16 L. J. Q. B. 239. A, being aware that B wished to obtain shares in a certain company, represented to B that he, A, could procure a certain number of shares at three pounds a share. B agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to A three pounds a share. He afterwards discovered that A was in fact the owner of the shares, having just bought them for two pounds a share. *Held*, that on the facts A was an agent for B, and A was ordered to pay back to B the difference between the prices of the shares: *Kimber v. Barb*, L. R. 8 Ch. App. 56; 27 L. T., N. S., 526; 21 Week. Rep. 65. A was to acquire an

¹ *Brown v. Bank of Missouri*, 2 Mo. 191; *Brown v. Harrison*, 17 Ala. 774. ² *Horstmann v. Baltzer*, 38 Hun. 367.

interest in a vessel when she should be built. *Held*, that the builder had no implied authority to purchase an outfit on A's credit: *De Wolf v. Tupper*, 24 Fed. Rep. 289.

§ 10. May be Conferred by Parol.—The authority may be expressed in writing, either by deed or unsealed instrument; it may be given orally.¹ Formerly it was said that an authority to act as one's agent should be given by deed or other instrument under seal, so that the proof of the authority would be clear and indisputable in every case.² But such a rule would be clearly absurd in an age like the present, where the multifarious business of commerce must be carried on with speed and without circumlocution; and so it is now well settled that no such formality is essential to the formation of the contract of agency. A parol (verbal) authority is sufficient to authorize an agent to contract for the sale of land;³ to confess judgment;⁴ to enter on land;⁵ to contract for the sale of a mining claim;⁶ to tender money to redeem land sold for taxes;⁷ to execute a lease for a year, not requiring a seal.⁸ An authority from a mortgagor of land to a third person to deliver possession to the mortgagee in order to foreclose need not be in writing.⁹

§ 11. Or Implied from Acts.—Or the appointment may be implied from the relations and actions of the parties,¹⁰—from the recognition of the principal, or his acquiescence in the acts of the agent.¹¹ Where one man

¹ Story on Agency, sec. 46; *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160; *Howe Machine Co. v. Clark*, 15 Kan. 492; *Paris v. Lewis*, 85 Ill. 597.

² Evans on Agency, 16.

³ *Ledbetter v. Walker*, 31 Ala. 175; *contra*, *Wallace v. Brown*, 10 N. J. Eq. 308.

⁴ *Dial v. Farrow*, 1 Spears, 114.

⁵ *Miles v. Cook*, 1 Grant Cas. 58.

⁶ *Patterson v. Keystone etc. Co.*, 30 Cal. 360.

⁷ *Gracio v. White*, 18 Ark. 17.

⁸ *State v. Watts*, 44 N. J. L. 126.

⁹ *Skinner v. Brewer*, 4 Pick. 468.

¹⁰ Story on Agency, secs. 54, 55; *Wharton on Agency*, secs. 40-44; *Gilbraith v. Lineberger*, 69 N. C. 145.

¹¹ *Mechanics' Bk v. Butchers' Bk*, 16 N. Y. 145; 69 Am. Dec. 678; *American Ins. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 561; *Pickett v. Pearsons*, 17 Vt. 470; *Milligan v. Davis*, 49 Iowa, 123; *Chidsey v. Porter*, 21 Pa. St. 390; *Dows v. Green*, 16 Barb. 72; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728; *Kiley v. Forsee*, 57 Mo. 390; *Weaver v. Ogletree*, 39 Ga. 566; *Kelsey v.*

acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not.¹ The consent of the owner to a disposition of his property may be inferred from acts as well as given in direct terms. It may be inferred when he gives such evidence of the authority of disposal as usually accompanies such authority, according to the custom of trade and the general understanding of business men.² Sending a conveyance containing a receipt for the consideration to a person for the purpose of completing a sale of the land described in the deed, and calling on the grantee to settle with such person, constitute the latter the grantor's agent.³ Where one bids off property at a sheriff's sale, in pursuance of an agreement previously made with another, by which the latter is to receive a portion of the property at a certain price, the relation between the two is that of principal and agent, and not of vendor and vendee.⁴ An agreement by a purchaser that a third person shall have a lien by mortgage or otherwise, after a certain time, for a debt due him from the vendor, does not constitute the vendor the agent of the purchaser to execute such mortgage.⁵ An astronomer who assists contracting engineers in their survey, and is paid with their money, but who is not appointed by them, and cannot be discharged by them, and who is not responsible to them,

National Bank, 69 Pa. St. 426; St. Louis etc. Packet Co. v. Parker, 59 Ill. 23; Summerville v. Hannibal etc. R. R. Co., 62 Mo. 391; Morgan v. Durrah, 39 Tex. 171; Commercial Bank v. Warren, 15 N. Y. 577; Kountz v. Price, 40 Miss. 341; Bank of Kentucky v. Brook- ing, 2 Litt. 41; Sweetzer v. French, 2 Cush. 30; 48 Am. Dec. 606.

¹ Minturn v. Burr, 16 Cal. 107.

² Wright v. Solomon, 19 Cal. 64; 79 Am. Dec. 196.

³ Pope v. Chafee, 14 Rich. Eq. 69.

⁴ Wright v. Calhoun, 19 Tex. 412.

⁵ Hyde v. Boston and Barre Co., 21 Pick. 90.

is not their agent.¹ But where the agent is appointed by writing, the writing must be produced or accounted for.² An agent's authority to execute a sealed instrument cannot be shown by a parol acknowledgment of the principal that a sealed authority had been given.³

ILLUSTRATIONS.—There was an agreement between A and B that A should purchase property at a sale for the benefit of B's creditors, and allow it to remain with B, to resell and reimburse A, and retain the surplus, if any. *Held*, that this did not make A the agent of B: *Haynes v. Crutchfield*, 7 Ala. 189; *Cravens v. Cravens*, 1 Morris, 285. A agrees with B, his debtor, that he will permit his note to be renewed, if it is indorsed by C. *Held*, that this does not constitute B the agent of A; nor is A liable for any fraud of B in procuring the indorsement of C: *Harris v. Bradley*, 7 Yerg. 310. H. applied to W. for a loan of one thousand dollars. W. told him if he would meet him on a certain day, with a bond and mortgage made out to one C., and would assign also to said C. a certain other bond and mortgage as collateral, he should have the money; they met, and W. telling H. that he had only six hundred dollars, which he would pay him as soon as he could raise it, if he would deliver to him the bonds and mortgages, H. delivered the papers. *Held*, that thereby H. made W. his agent to deliver them to C., and to receive the money from him: *Cooper v. Headley*, 12 N. J. Eq. 48. The question is, whether an agent (not having, by the papers which created him such agent and defined his powers, any authority to alter a policy which had been issued by his principal), "was permitted to alter policies in respect to days of sailing, from time to time, so that that became the customary usage and course of business." *Held*, that the evidence must show, in order to bind the principal, at least several cases in which the agent, without asking the sanction of his acts by the principal, had made alterations of a like nature on which the principal had acted, and in which he had acquiesced when such alterations came to his knowledge; or it must tend to prove that, although communicated by the agent, they were acquiesced in, as acts which he was competent to perform, and as binding on his principal; or that he was held out to the public as authorized to do such acts: *Bunten v. Orient etc. Ins. Co.*, 4 Bosw. 254. A son had been for years in the habit of signing his father's name as indorser upon promis-

¹ *Jones v. United States*, 1 Ct. of Cl. 383.

² *Neal v. Patten*, 40 Ga. 363; *Rawson v. Curtis*, 19 Ill. 456.

³ *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; *Paine v. Tucker*, 21 Me. 138; 38 Am. Dec. 255.

sory notes made by himself, and the father knew the fact, but took no steps to prevent such use of his name, and gave no notice, etc. *Held*, that a presumption was created that the son had authority to sign his father's name, and the father was liable upon such notes: *Weaver v. Ogletree*, 39 Ga. 586. In an action for suing the plaintiff in the name of a third person, without authority, evidence that the third person had suffered a default, and that execution had issued against him to recover for services rendered in prosecuting the suit so brought without his authority, *held*, inadmissible to show that the defendant was authorized to bring the previous suit in his name: *Foster v. Dow*, 29 Me. 442. Upon a sale of grain in store, the vendor handed the order on the storekeeper for the delivery of the corn to a lighter-man, and employed him to carry it away, instead of leaving that to be done by the purchasers, as was customary, but the latter paid the lighterage. *Held*, that the lighter-man was to be considered as the agent of the latter for the transportation of the grain, of which there had been a delivery to the purchasers according to the custom, while it was yet in store: *McCready v. Wright*, 5 Duer, 571. A bank delivered to A certain notes, with a request that he would pass them away for the benefit of the bank, or, if he could not do that, to return them, which he agreed to do. *Held*, A, *quoad hoc*, is the servant of the bank: *Towson v. Havre De Grace Bank*, 6 Har. & J. 47; *Bridenbecker v. Lowell*, 32 Barb. 9. W., an agent for A., sold but did not transfer stock to C., and promised C. to "be accountable for such dividends as he or his agent should receive before transfer." *Held*, that he thereby became C.'s agent to receive such dividends: *Cropper v. Adams*, 8 Pick. 40. Where a person, acting ostensibly as the agent of the defendants, was at the time of the transaction in question, and for years had been, a clerk in their store, and had as their agent done business in many instances with the plaintiffs. *Held*, that these facts established his general agency: *Eagle Bank v. Smith*, 5 Conn. 71; 13 Am. Dec. 37. A received of B a note, and agreed to indorse it on another note in favor of C. *Held*, in a suit against A, that proof of such act and agreement alone did not conduce to prove that A in such transaction was the authorized agent of B: *Plant v. McEwen*, 4 Conn. 544. Defendant sent to a builder, whom he had employed to build and finish his house, a note requesting him to procure mantel-pieces like some which another person had purchased from plaintiffs. This note the builder showed to plaintiffs without comment, and ordered some mantel-pieces from them. *Held*, that defendant was not liable to plaintiffs for the price. The circumstance did not warrant plaintiffs in assuming that the builder made the purchase as agent: *Murphy*

v. *Winchester*, 35 Barb. 616. The master of a barge finds a person apparently in charge of a wharf, and moors his barge where this person directs, presuming him to be the agent of the wharf-owner. *Held*, that he may hold the owner liable if the barge sustains injury by the place of mooring being an unsafe one: *Pennsylvania R. R. Co. v. Atha*, 22 Fed. Rep. 920. A ticket-agent in the employ of the L. R. R. Co. sold the tickets of the P. R. R. Co. He was directed to do so by the L. Co., which was compensated by the P. Co. under a contract between them. The agent, after selling the P. Co.'s tickets, as well as those of the L. Co., for two years, left the employment of the L. Co., and brought suit against the P. Co. for services in selling its tickets. There was no proof of a contract or of an express promise. *Held*, that he could not recover: *Pennsylvania R. R. Co. v. Flanigan*, 112 Pa. St. 558.

§ 12. **Declarations of Agent.**—The authority of the agent to bind the principal cannot be proved by the agent's statements as to the extent of his authority;¹ nor can an agent give himself authority to bind his principal by false statements to those with whom he deals as to the extent of his authority;² nor can a special agent enlarge his authority by such statements.³ Statements by an agent, before he received authority to act, or after it had been withdrawn, or not within the scope of his agency, do not bind his principal.⁴

§ 13. **Authority to Execute Instrument under Seal.**—Yet where the agent is to execute his authority by deed, his appointment is required to be under seal also.⁵ But

¹ *Howe Machine Co. v. Clark*, 15 Kan. 492; *Reynolds v. Continent Ins. Co.*, 36 Mich. 131; *Maxey v. Heckethorn*, 44 Ill. 438; *Rawson v. Curtis*, 19 Ill. 474; *Brigham v. Peters*, 1 Gray, 139; *Peck v. Ritchey*, 66 Mo. 114; *Streeter v. Poor*, 4 Kan. 412; *Chicago etc. R. R. Co. v. Fox*, 41 Ill. 106; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Perkins v. Stebbins*, 29 Barb. 523; *McDougald v. Dawson*, 30 Ala. 553; *Scarborough v. Reynolds*, 12 Ala. 252; *Stringham v. Ins. Co.*, 4 Abb. App. 315; 37 How. Pr. 375; *Whiting v. Lake*, 91 Pa. St. 349. But an agency

may be proved by the agent himself: *Thayer v. Meeker*, 86 Ill. 470.

² *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. 315; *Grover and Baker Co. v. Polhemus*, 34 Mich. 247.

³ *Stollenwerck v. Thacher*, 115 Mass. 224.

⁴ *Clark v. Baker*, 2 Whart. 340.

⁵ *Rowe v. Ware*, 30 Ga. 278; *Wheeler v. Nevins*, 34 Me. 54; *Hanford v. McNair*, 9 Wend. 54; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; 12 Wend. 525; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Worrall v. Munn*, 5 N. Y.

a deed of land by an agent, authorized simply by a power not under seal, though inoperative to convey the legal title, will in equity be evidence of a contract to convey, to sustain a suit for specific performance against the principal.¹ If an agent, not properly authorized to execute a contract under seal, execute a contract under seal which does not require this formality, it will be held valid and binding on the principal as a simple contract.² "It is a maxim of the common law, that an authority to execute a deed or instrument under seal must be conferred by an instrument of equal dignity and solemnity,—that is, by one under seal. This rule is purely technical. A disposition has been manifested by most of the American courts to

229; *Preston v. Hull*, 23 Gratt. 600; 14 Am. Rep. 153; *Scheutze v. Bailey*, 40 Mo. 69; *Cooper v. Rankin*, 5 Binn. 613; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731; *Cummins v. Cassely*, 5 B. Mon. 75; *Emerson v. Prov. Hat Co.*, 12 Mass. 240; 7 Am. Dec. 66; *Harshaw v. McKesson*, 65 N. C. 688; *Mans v. Worthing*, 3 Seam. 26; *Adams v. Power*, 52 Miss. 828; *Damon v. Granby*, 2 Pick. 345; *Banorjee v. Hovey*, 5 Mass. 11; 4 Am. Dec. 17; *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529; *Gordon v. Bulkley*, 14 Serg. & R. 331; *Wells v. Evans*, 20 Wend. 251; *Van Horne v. Frick*, 6 Serg. & R. 90; *Lawrence v. Taylor*, 5 Hill, 113; *Delais v. Cawthorne*, 2 Dev. 90; *Davenport v. Sleight*, 2 Dev. & B. 381; 31 Am. Dec. 420; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Blackwell v. Parish*, 6 Jones Eq. 72; *Phelps v. Call*, 7 Ired. 264; 47 Am. Dec. 327; *Tuberville v. Ryan*, 1 Humph. 113; 34 Am. Dec. 622; *Williams v. Gillies*, 75 N. Y. 202. But see *Peine v. Weber*, 47 Ill. 44; *Hefner v. Palmer*, 67 Ill. 161; *Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Humphreys v. Finch*, 97 N. C. 303; 2 Am. St. Rep. 293. The acknowledgment of a power of attorney to convey lands is not necessary to admit it in evidence: *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715.

¹ *Groff v. Ramsey*, 19 Minn. 44; *Lawrence v. Taylor*, 5 Hill, 107; *Baum v. Dubois*, 43 Pa. St. 260; *Pringle v.*

Spaulding, 53 Barb. 17; *Scheutze v. Bailey*, 40 Mo. 69; *Irvine v. Thompson*, 4 Bibb, 296; *Stackpole v. Arnold*, 11 Mass. 27; 6 Am. Dec. 150; *Johnson v. McGruder*, 15 Mo. 365; *Blood v. Hardy*, 15 Me. 61; *Morrow v. Higgins*, 29 Ala. 450; *Ledbetter v. Walker*, 31 Ala. 176; *Newton v. Bronson*, 13 N. Y. 593; 67 Am. Dec. 89; *Jackson v. Murray*, 5 T. B. Mon. 184; 17 Am. Dec. 53; *Jones v. Marks*, 47 Cal. 242.

² *Dickerman v. Ashton*, 21 Minn. 538; *State v. Spartenburg R. R. Co.*, 8 S. C. 129; *Despatch Line v. Bellamy*, 12 N. H. 205; 37 Am. Dec. 233; *Lawrence v. Taylor*, 5 Hill, 107; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Long v. Hartwell*, 34 N. J. L. 116; *Cooper v. Rankin*, 5 Binn. 613; *Ledbetter v. Walker*, 31 Ala. 175; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Tapley v. Butterfield*, 1 Met. 515; 35 Am. Dec. 374; *Love v. Sierra Nevada Co.*, 32 Cal. 654; 91 Am. Dec. 602; *Ingraham v. Edwards*, 64 Ill. 528; *Dean v. Roesler*, 1 Hilt. 421; *Haight v. Sabler*, 30 Barb. 223; *Wood v. Auburn etc. R. R. Co.*, 8 N. Y. 167; *Ford v. Williams*, 13 N. Y. 585; 67 Am. Dec. 83; *Bellinger v. Bentley*, 4 Thomp. & C. 74. But see *Baker v. Freeman*, 35 Me. 485; *Fullam v. West Brookfield*, 9 Allen, 6. Yet if it be declared on as a contract under seal, there can be no recovery against the principal: *Ingraham v. Edwards*, 64 Ill. 526.

relax its strictness, especially in its application to partnership and commercial transactions. I think the doctrine as it now prevails may be stated as follows, viz.: If a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority, or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal."¹

ILLUSTRATIONS.—A deed was executed by the grantor, a blank being left for the name of the grantee, who afterwards, by parol, authorized an agent to fill in his name. The deed was held void: *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Graham v. Holt*, 3 Ired. 300; 40 Am. Dec. 408; *Williams v. Crutcher*, 5 How. (Miss.) 71; 35 Am. Dec. 422; *Davenport v. Sleight*, 2 Dev. & B. 381.

§ 14. **Same—Principal Present.**—Unless the deed be made in his presence. In this case, if the principal be present, and verbally or impliedly authorize the agent to execute a deed for him, it is binding on him.²

ILLUSTRATIONS.—A, by B's authority, and in his presence, signed B's name to a recognizance of bail for the stay of execution. *Held*, binding on B: *Croy v. Busenbark*, 72 Ind. 48. A authorized B to borrow money of C, and sign his name to a note for it. B borrowed the money, and at his request and in his presence D signed A's name to the note, thus, "A by D." *Held*, that this was the act of B, and in legal effect the act of A; and that A was bound: *Weaver v. Carnall*, 35 Ark. 198; 37 Am. Rep. 22. A marriage settlement was brought to the door of a room where the bride was preparing for the wedding ceremony, and she requested the bearer in the presence of a witness to sign it for her. He withdrew to the yard adjoining and signed it there. *Held*, a good execution: *Reinhart v. Miller*, 22 Ga. 402; 68 Am. Dec. 506. A daughter testified that a servant of H. brought a bond to her father signed by H. and containing a seal for another name, with a request from H. to her father to

¹ Paige, J., in *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330.

² *Gardner v. Gardner*, 5 Cush. 483; *McMurtry v. Brown*, 6 Neb. 363.

sign it. Her father by reason of infirmity could not write, and directed her to sign it for him; for that purpose he laid the paper on a table, and then went out of the house. She signed his name as she had often done before, and delivered it to H.'s servant. The father made no objection afterwards. *Held*, not to be such a signing in his presence as would bind the father: *Kime v. Brooks*, 9 Ired. 218. One partner read and approved an arbitration bond, and consented that his copartner should execute it. *Held*, that such execution in the name of the firm by the copartner, his partner being in the store at the time although not in his immediate presence, was good: *Mackay v. Bloodgood*, 9 Johns. 285. A married woman requested her daughter to sign her name to a mortgage, which was done in her presence. *Held*, as valid as if it had been written by herself: *Jansen v. McCahill*, 22 Cal. 563; 83 Am. Dec. 84. A husband at his wife's request signed her name to a deed several days after his own had been signed, and in her absence. It also appeared that she had subsequently stated several times that he did so at her request. *Held*, sufficient to bar her dower: *Frost v. Deering*, 21 Me. 156. An illiterate son conveyed his lands to his father, and executed the deed by orally authorizing another person to sign it in his presence, afterwards duly acknowledging it. *Held*, to be a valid conveyance: *Baker v. Decker*, 64 Me. 550. One witness who was present at the execution testified that a married woman executed a deed by a third person taking hold of her hand and signing her name, which deed was then duly acknowledged. *Held*, to constitute a good signing: *Pierce v. Hakes*, 23 Pa. St. 231. A written lease was shown and read to a woman who took a pencil to sign it, but found that her name had been already written by her brother, who had himself signed as surety for the rent. She thereupon delivered the lease, stating that she supposed he had written her name, and it was all right. *Held*, in the absence of fraud, that there was a sufficient execution to bind her: *Speckels v. Sax*, 1 E. D. Smith, 253.

§ 15. **Unsealed Writings.**—Yet the law does not require that an authority to an agent to sign an unsealed instrument or writing should likewise be in writing.¹ Thus an agent may be verbally authorized to sign or indorse

¹ *McWhorter v. McMahan*, 10 Paige, 386; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 80; *Baum v. Dubois*, 43 Pa. St. 260; *Lawrence v. Taylor*, 5 Hill, 107; *Riley v. Minor*, 29 Mo. 439; *Curtis v. Blair*, 26 Miss. 309; 59 Am. Dec. 257; *Shaw v. Nudd*, 8 Pick. 9.

notes for another,¹ though it has been held that an authority to sell lands is not good by parol.² On the other hand, it has been held that the authority of an agent to make a *contract* for the sale of real estate need not be under seal,³ or even in writing.⁴ But the proof of the agent's authority must be clearly shown by the party seeking to enforce the contract made by him.⁵

ILLUSTRATIONS.—A principal wrote to his general agent to sell his lands in Minnesota. *Held*, that the agent was thereby authorized to contract to convey, though he had no authority under seal which was necessary for an actual conveyance: *Minor v. Willoughby*, 3 Minn. 225.

§ 16. Statute of Frauds.—The authority of an agent to make a *contract* for the sale of lands, under the fourth or seventeenth sections of the statutes of frauds, is not required to be in writing.⁶

§ 17. Agents of Corporations.—The agents of corporations, originally at common law required to be authorized by the seal of the corporation in almost every case, are now appointed without seal, as by vote of the directors, or even by recognition of their acts.⁷

¹ Rawson v. Curtis, 19 Ill. 456.

² Vanhorne v. Frick, 6 Serg. & R. 90.

³ Baum v. Dubois, 43 Pa. St. 260; Riley v. Minor, 29 Mo. 439; Rottman v. Wasson, 5 Kan. 552; Evans on Agency, 27.

⁴ Dickerman v. Ashton, 21 Minn. 538; Brown v. Eaton, 21 Minn. 409.

⁵ Proudfoot v. Wightman, 78 Ill. 553; Duffy v. Hobson, 40 Cal. 240; 6 Am. Rep. 617; Treat v. De Celis, 41 Cal. 202.

⁶ Lawrence v. Taylor, 5 Hill, 107; Mortimer v. Cornwell, 1 Hoff. Ch. 351; Riley v. Minor, 29 Mo. 439; Rottman v. Wasson, 5 Kan. 552; Long v. Hartwell, 34 N. J. L. 116; Dickerman v.

Ashton, 21 Minn. 538; Brown v. Eaton, 21 Minn. 409; McWhorter v. McMahon, 10 Paige, 386; Moody v. Smith, 70 N. Y. 598; Jackson v. Murray, 5 T. B. Mon. 184; 17 Am. Dec. 53; Worrell v. Munn, 5 N. Y. 229; 55 Am. Dec. 330; Doty v. Wilder, 15 Ill. 411; 60 Am. Dec. 755; Squier v. Norris, 1 Lans. 284; Henry v. Root, 33 N. Y. 550; Haydock v. Stone, 40 N. Y. 368; Briggs v. Partridge, 64 N. Y. 364; 21 Am. Rep. 617. Rule changed in some states by statute: See Bissell v. Terry, 69 Ill. 184.

⁷ This subject is considered under Title II., Corporations, *post*.

CHAPTER IV.

JOINT PRINCIPALS AND AGENTS.

- § 18. Joint principals not agents for each other.
- § 19. Unless they be partners.
- § 20. Rights and liabilities of joint principals.
- § 21. Joint agents must act together.
- § 22. Agency for public purpose.
- § 23. Liability of joint agents.

§ 18. Joint Principals not Agents for Each Other.—

One of two or more joint tenants or owners or tenants or owners in common cannot appoint an agent to act for and bind the interest of the other or others without their assent.¹

ILLUSTRATIONS.—A, the owner of a parcel of cloth, and B, the owner of another parcel of cloth, by a joint instrument consign the two parcels to C to sell. The parcels are subject to separate instructions, and C cannot sell B's parcel on instructions by A, or *vice versa*: *Cooper v. Eyre*, 1 H. Black. 37; Story on Agency, sec. 38; Wharton on Agency, sec. 54; *Johnson v. O'Hara*, 5 Leigh, 456. One of two tenants in common represents himself as the agent of the other, and sells the land of both. The title to his co-tenants' land will not pass: *Sewell v. Holland*, 61 Ga. 608.

§ 19. Unless They be Partners.—But if they be partners the rule is different, for one partner is the agent of the others for all the purposes of the partnership business.² Therefore, where two railroad companies do business together, sharing the profits with a common office under the charge of a general agent, they are jointly liable

¹ Story on Agency, sec. 38; Wharton on Agency, sec. 54; United States Ins. Co. v. Scott, 1 Johns. 103; Evans on Agency, 26.

² Story on Agency, sec. 39. As to notice to quit given by one of several

joint tenants, see Evans on Agency, 26; *Chemung Canal B'k v. Bradner*, 44 N. Y. 680. But the agent of a partnership is the agent of the firm, and not of the individuals: *Johnston v. Brown*, 18 La. Ann. 330.

on a contract made with a shipper by such agent.¹ And so of part owners of ships.²

§ 20. Rights and Liabilities of Joint Principals.—On the sale of several parcels of goods by a factor, belonging to different principals, on a credit, taking one note from the purchaser for the whole, payable to himself, the right of each principal to his remedy for his share is not extinguished.³ And one principal can sue another to recover money belonging to him paid by the agent to the wrong party.⁴ But where a number of persons appoint a common agent for a common purpose, no one of them has a right to compel a separate account to himself.⁵ Where one of several claimants to a fund appoints an agent to collect it, and account to him, he becomes a trustee for the others, and an action may be brought in his name against the agent to recover the fund.⁶ Where the same agent was appointed by two different mines in the same place, and it became necessary for one to deal with the other, it was held that he had the same power to act for both that two agents acting separately would have had.⁷ So several principals may employ the same agent without incurring a joint liability.⁸

§ 21. Joint Agents must Act Together.—Where authority is given to two or more persons to do an act, all must concur in its execution.⁹ One of two private agents

¹ *Barrett v. Indianapolis etc. R. R. Co.*, 14 Am. Law Rev. 602.

² *Story on Agency*, sec. 40; *Reiman v. Hamilton*, 111 Mass. 245.

³ *Corlies v. Cumming*, 6 Cow. 181.

⁴ *Hathaway v. Cincinnatus*, 62 N. Y. 434.

⁵ *Louisiana Trustees v. Dupuy*, 31 La. Ann. 305.

⁶ *Noe v. Christie*, 51 N. Y. 270.

⁷ *Adams Mining Co. v. Senter*, 26 Mich. 73.

⁸ *Evans on Agency*, 26; *Cooper v. Eyre*, 1 H. Black. 37.

⁹ *Peter v. Beverly*, 10 Pet. 532; *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Towne v. Jacquith*, 6 Mass. 46; 4 Am. Dec. 84; *Kupfer v. Inhabitants*, 12 Mass. 185; *Low v. Perkins*, 10 Vt. 532; 33 Am. Dec. 217; *Heard v. March*, 12 Cush. 580; *Green v. Miller*, 6 Johns. 39; 5 Am. Dec. 184; *Cedar Rapids R. R. Co. v. Stewart*, 35 Iowa, 115; *Osgood v. Franklin*, 2 Johns. Ch. 1; 7 Am. Dec. 513; *Franklin v. Osgood*, 14 Johns. 527; *Johnston v. Bingham*, 9 Watts & S. 56; *Commissioners v. Lecky*, 6 Serg.

under a joint power of attorney cannot delegate his power to the other.¹ In like manner, where a firm is employed as agents, one of the partners cannot act after the death of the other. "It is a general rule of the common law that an authority by a principal to two persons to do an act is joint, and the act must be concurred in by both. Where a firm is appointed to an agency, this rule would necessarily be void, to the extent that either member of a firm could do any act within the scope of the agency, the same as he could perform any other partnership act. By appointing a partnership firm, it would be implied that the authority was joint and several; but upon a dissolution of the firm, such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act nor agreed to be responsible for his acts, and the latter could incur no obligation against the deceased member or his representatives."² The power, however, may be given in such terms as to authorize a several execution, or an execution by a less number than the whole.³ Usage of trade may change this rule,—as where it is the custom of business for one of several joint factors to act for the common principal.⁴ The authority to receive money on a debt due to their assignor may be exercised by one of several assignees.⁵ And so where the power is coupled with an

& R. 166; 9 Am. Dec. 418; *In re Turnpike Road*, 5 Binn. 481; *Hawley v. Keeler*, 53 N. Y. 114; *Sinclair v. Jackson*, 8 Cow. 543; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Floyd v. Johnson*, 2 Litt. 115; 13 Am. Dec. 255; *Rollins v. Phelps*, 5 Minn. 403; *Union Bank v. Beirne*, 1 Gratt. 226; *Inhabitants v. Cole*, 3 Pick. 232; *Damon v. Inhabitants*, 2 Pick. 345; *Woolsey v. Tompkins*, 23 Wend. 324; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699; *Damon v. Granby*, 2 Pick. 345; *Sutton Parish v. Cole*, 3 Pick. 232.

¹ *Loeb v. Drakeford*, 75 Ala. 464.

² *Martine v. International Life Ins. Co.*, 53 N. Y. 339; 13 Am. Rep. 529.

³ *Cedar Rapids etc. R. R. Co. v. Stewart*, 25 Iowa, 115; *French v. Price*, 24 Pick. 13; *Hawley v. Keeler*, 53 N. Y. 114; 62 Barb. 231; *Gas Co. v. Wheeling*, 8 W. Va. 321; *Phippen v. Stickney*, 3 Met. 384.

⁴ *Story on Agency*, sec. 44; *Wharton on Agency*, sec. 141.

⁵ *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 197.

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interest, it may be executed by the survivor.¹ Where two agents are appointed by separate instruments, to act with equal authority for the principal, the right to act is not exclusive in either; but any act done by one within the authority granted will be binding on the other.² One of several assignees of a chose in action, with power to collect debts, may make a demand for it.³

ILLUSTRATIONS.—A gives B and C jointly power to sell his property. A sale by either B or C alone will not bind A: *Copeland v. Insurance Co.*, 6 Pick. 198. Two persons are appointed agents jointly to take charge of their principal's business. One of them becomes incapacitated. The business cannot be conducted by the other alone: *Salisbury v. Brisbane*, 61 N. Y. 617; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180. Authority is given to A and B to use their principal's name as an indorser. This authority can only be used by A and B jointly: *Union Bank v. Beirne*, 1 Gratt. 226. L. entered into a contract with five individuals, as agent or trustee of an association for building a church, to erect it on certain terms. In an action against them for the work, L. attempted to show that by an agreement between him and two of them, the special contract was abandoned and he was to be paid a *quantum meruit*. *Held*, inadmissible: *Low v. Perkins*, 10 Vt. 532; 33 Am. Dec. 217.⁴ A note was given by defendants to three persons, who were to arbitrate the difference between defendant and plaintiff, and indorse it over to plaintiff if they thought him entitled to it. It was indorsed over to plaintiff by two of them, the other refusing to join. *Held*, that the power was not properly executed, and the plaintiff could not recover on the note: *Patterson v. Leavitt*, 4 Conn. 50; 10 Am. Dec. 98. A power of attorney was given by a party to fifteen persons named, "jointly and separately, for him and in his name to sign and underwrite all such policies as they, his said attorneys, or any of them," should jointly think proper. *Held*, that a policy made by four of the fifteen was binding on the principal: *Guthrie v. Armstrong*, 5 Barn. & Ald. 628. Authority is given to A and B, or either of them. *Held*, that a joint or several execution will be valid: *Cedar Rapids etc. R. R. Co. v. Stewart*, 25 Iowa, 115.

¹ *Peter v. Beverly*, 10 Pet. 532; *Osgood v. Franklin*, 2 Johns. Ch. 1; 7 Am. Dec. 513; *Franklin v. Osgood*, 14 Johns. 527.

² *Cushman v. Glover*, 11 Ill. 600; 52 Am. Dec. 461.

³ *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 197.

⁴ "The court," said Phelps, J., "did right in rejecting the testimony. Where several individuals are associated in a public trust, it is competent for a majority to act and to bind their principals; but in the case of a private trust or agency, the rule is different, and the concurrence of all is necessary."

§ 22. **Agency for Public Purpose.**—And where the joint authority is given, not by the act of the principal, but by the act of the law,¹ or is for a public purpose,² the rule is different. Thus in the execution of trusts for public purposes (as, for example, boards of public works, boards of charity, boards of corporations), unless the power is otherwise limited by the act of incorporation, or the act creating the board, the acts of the majority are binding.³ "In all matters of public concern, the voice of the majority must govern. Whether the statute expressly authorize a majority to act or is silent, the principle to be extracted from the numerous cases on this head is, that where a number of persons are intrusted with power, not of mere private confidence, but in some respect of a general nature, and all of them are assembled, the majority will conclude the minority."⁴ But a majority must act, and therefore if the board be composed of only two, one cannot exercise the powers alone,⁵ and though a majority may decide, all must meet and deliberate.⁶

§ 23. **Liability of Joint Agents.**—Joint agents are jointly liable each for the other's acts and receipts, and it is no defense that one wholly transacted the business without the knowledge of the other.⁷

¹ *Caldwell v. Harrison*, 11 Ala. 735; *Scott v. Detroit Soc.*, 1 Doug. (Mich.) 119; *Jewett v. Alton*, 7 N. H. 253.

² *Worcester v. R. R. Co.*, 113 Mass. 161; *Solus v. Racine*, 10 Wis. 271.

³ *Id.*; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Grindley v. Barker*, 1 Bos. & P. 229; *County Commissioners v. Lecky*, 6 Serg. & R. 170; 9 Am. Dec. 418; *Commissioners v. Canal Commissioners*, 9 Watts, 470; *In re State Road*, 60 Pa. St. 330; *Patterson v. Leavitt*, 4 Conn. 50; 10 Am. Dec. 98; *McCoy v. Curtice*, 9 Wend. 17; 24 Am. Dec. 113; *contra*, *Jeter v. Commissioners*, 1 Bay, 354; 1 Am. Dec. 621.

⁴ *McCreedy v. Guardians of the Poor*, 9 Serg. & R. 91; 11 Am. Dec. 607.

⁵ *Cooper v. Lampeter Township*, 8

Watts, 128; *Downing v. Rugar*, 21 Wend. 178; 34 Am. Dec. 223.

⁶ *In re State Road*, 60 Pa. St. 330; *Downing v. Rugar*, *supra*; *Schuyler v. Marsh*, 37 Barb. 355, and note in 34 Am. Dec. 228; *Crocker v. Crane*, 21 Wend. 211; 34 Am. Dec. 228. And so where a majority of arbitrators are authorized to make an award, the minority must be present at the hearing, or at least must have been notified of it: *Blin v. Hay*, 2 Tyler, 394; 4 Am. Dec. 733; *Moore v. Ewing*, 1 N. J. L. 195; 1 Am. Dec. 195.

⁷ *Snelling v. Howard*, 51 N. Y. 373; *McIlreath v. Margetson*, 4 Doug. 278; *Wharton on Agency*, sec. 142; *Cushman v. Glover*, 11 Ill. 600; 52 Am. Dec. 461. See Division III., Trustees, *post*.

CHAPTER V.

DELEGATION OF AUTHORITY.

§ 24. Delegation of original and delegated authority.

§ 25. Delegation of original authority.

§ 26. Delegation of delegated authority.

§ 27. Same — When not permitted.

§ 28. Same — When permitted.

§ 24. Delegation of Original and Delegated Authority.

—An authority or power is either original or delegated. Thus I may make an offer to another either in my own right or on account of authority given to me by some one else. But the general principle of the common law is as to these two conditions quite different. I may, with very few exceptions, do by another what I can do in my own right. On the other hand, I may not, except in some special cases, do by another what some one else has authorized me alone to do for him.

§ 25. Delegation of Original Authority. — Whatever

a man may do himself he may do by a legal agent. To this general rule there appear to be only two exceptions: 1. The power to do an illegal act cannot be delegated to another;¹ and 2. The power to do a purely personal act cannot be delegated to another. For example, a man could not appoint an agent to marry a woman for him, or to make a will for him;² nor can, it seems, a married woman make a deed (required by statute to be done with certain

¹ *Elmore v. Brooks*, 6 Heisk. 45; *Brown v. Howard*, 14 Johns. 120; *Davis v. Barger*, 57 Ind. 54; *Wharton on Agency*, sec. 25; *State v. Mathis*, 1 Hill (S. C.) 37. The authority of an agent to do an illegal act will not be presumed: *Gokey v. Knapp*, 44 Iowa, 32. The authority is presumed legal, and a servant has the burden of showing a lawful reason for refusing to obey

an order: *Chicago etc. R. R. Co. v. Bayfield*, 37 Mich. 205.

² So at common law a man could not do homage or fealty by attorney, for the service was personal; and though a lord might beat his vassal without cause, he could not authorize another to beat him without cause: 9 Coke, 76 a, 76 b; and see *Ex parte Ugra Bank*, L. R. 6 Ch. 206.

formalities, as to privy examination, etc.) by an attorney.¹ The power of an executor or administrator over the estate is not a delegated power, for he is himself an owner *in auter droit*; and therefore he may make an attorney to transfer stock belonging to the estate.² A covenant under seal to do a particular thing requiring skill and judgment cannot be performed by an agent.³ A bailment of property with a power of sale is a personal trust to the bailee which he cannot delegate.⁴

§ 26. Delegation of Delegated Authority.—An authority or power received from another cannot be delegated,⁵ except in the instances hereafter stated. The maxim of the law is, *Delegata potestas non potest delegari*; the reason for the rule being that one who selects another to do an act for him relies on the skill and integrity of the person selected, and cannot be presumed to intend that another not selected by him should exercise the authority conferred on the man of his choice. Where an agent is appointed to sell property, a sale made in his absence, and when he could not control the sale and its terms, by one pretending to represent him, is not the act of the agent, and does not bind either him or his principal.⁶ A broker who sells on the order of a broker in another city is the agent of the latter, and has no claim against the original principal.⁷

¹ Story on Agency, sec. 12, note.

² *Hutchins v. State Bank*, 12 Met. 421, 427.

³ *Paul v. Edwards*, 1 Mo. 30.

⁴ *Hunt v. Douglass*, 22 Vt. 128.

⁵ *Bocock v. Pavay*, 8 Ohio St. 270; *Warner v. Martin*, 11 How. 209; *Tibbets v. Walker*, 4 Mass. 507; *Commercial Bank v. Norton*, 1 Hill, 501; *Lynn v. Burgoyne*, 13 B. Mon. 400; *Bissell v. Roden*, 34 Miss. 63; 84 Am. Dec. 71; *Smith v. Sublett*, 28 Tex. 163; *Loomis v. Simpson*, 13 Iowa, 532; *Hawley v. James*, 5 Paige, 323; *Lyon*

v. Jerome, 26 Wend. 485; 37 Am. Dec. 271; *Locke's Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716; *Ex parte Winsor*, 2 Story, 411; *Lewis v. Ingersoll*, 3 Abb. App. 55; 1 Keyes, 347; *Barret v. Rhem*, 6 Bush, 466; *McCormick v. Bush*, 38 Tex. 314; *Hicka v. Dorn*, 9 Abb. Pr., N. S., 53; 42 N. Y. 51; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699; *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319.

⁶ *Barret v. Rhem*, 6 Bush, 466.

⁷ *Hill v. Morris*, 15 Mo. App. 322.

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§ 27. **Same—When not Permitted.**—The following have been held not to have the right to delegate their authority: An agent appointed by the owner of an estate to sell it;¹ or an executor with power to sell;² or a broker authorized to sign a contract for his principal;³ or an agent authorized to give a note or do other acts;⁴ a general agent of an insurance company;⁵ arbitrators appointed to decide a question;⁶ a judge;⁷ a keeper appointed by a sheriff;⁸ the governing body of a municipal corporation, to an inferior body or agent;⁹ an attorney at law;¹⁰ a corporation authorized to levy assessments on its members;¹¹ directors of a corporation authorized to execute a lease for the corporation;¹² a committee appointed to repair dams and fishways;¹³ canal commissioners having authority by statute to enter upon lands and take and use property "as they may think proper."¹⁴ An agent employed to drive

¹ *Bocock v. Pavey*, 8 Ohio St. 270.

² *Story on Agency*, sec. 13.

³ *Evans on Agency*, sec. 40.

⁴ *Brewster v. Hobart*, 15 Pick. 302; *Emerson v. Providence Hat Co.*, 12 Mass. 237; 7 Am. Dec. 66; *Crozier v. Revis*, 4 Ill. App. 564.

⁵ *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148.

⁶ *Haven v. Winnisimmet Co.*, 11 Allen, 377; 87 Am. Dec. 723; *Little v. Newton*, 2 Scott N. R. 509. Such powers are judicial, and are clearly not to be delegated. They may, however, it seems, delegate purely ministerial acts: *Moore v. Barnet*, 17 Ind. 349. And though they agree to be bound by the opinion of a third person, if they afterwards disregard it, the award will not be void: *Haff v. Blossom*, 5 Bosw. 559.

⁷ *Winchester v. Ayres*, 4 G. Greene, 104.

⁸ *Connor v. Parker*, 114 Mass. 331.

⁹ *State v. Jersey City*, 25 N. J. L. 309; 26 N. J. L. 444; *White v. Mayor*, 2 Swan, 364; *Thompson v. Schermerhorn*, 6 N. Y. 92; 55 Am. Dec. 385; *Sheehan v. Gleason*, 46 Mo. 100; *Rugles v. Collier*, 43 Mo. 359; *Richardson v. Heydenfeldt*, 46 Cal. 68; *East St.*

Louis v. Wehnung, 50 Ill. 28; *Foss v. Chicago*, 56 Ill. 354.

¹⁰ *O'Connor v. Arnold*, 53 Ind. 233; *Weeks on Attorneys*, sec. 246.

¹¹ *Ex parte Winsor*, 3 Story, 411.

¹² *Gillis v. Bailey*, 21 N. H. 149.

¹³ *Stoughton v. Baker*, 4 Mass. 522; 3 Am. Dec. 236.

¹⁴ *St. Peter v. Denison*, 58 N. Y. 421; 17 Am. Rep. 258; *Curtiss v. Leavitt*, 15 N. Y. 190; *The California*, 1 Saw. 603; *Lyon v. Jerome*, 26 Wend. 485; 37 Am. Dec. 271. In this case it was said: "In all cases of delegated authority, where the delegation indicates any personal trust or confidence reposed in the agent, and especially where such personal trust is implied by making the exercise and application of the power subject to the judgment or discretion of the agent or attorney, the general rule is, that these are purely personal authorities, incapable of being again delegated to another, unless a special power of substitution be added. From an early period of our law, this rule has been laid down as to powers given by will or deed to executors, trustees, and attorneys, to sell lands, make leases, etc.; and modern decisions have extended the prin-

cattle, to whom the possession thereof is intrusted by the principal, cannot deliver such possession to a subagent appointed by himself.¹

ILLUSTRATIONS. — M. gave J. a power of attorney to sell lands, with power of substitution; J. executed a power to C. to sell them in J.'s name, and signed it with his own name, not referring to his principal, M. C. made a deed as attorney of M. *Held*, invalid, as C. was not appointed M.'s attorney: *Stinchcomb v. Marsh*, 15 Gratt. 202. P., a sheriff, by a writing directed to one by name, "or bearer," appointed him keeper of attached property. He, with P.'s knowledge, transferred his office and the writing to another, who, without the sheriff's knowledge, transferred them to C. *Held*, that an action by C. to recover pay as keeper could not be maintained, because the assignor could not delegate his authority; but, if the authority could be delegated, evidence that C.'s assignor had agreed to act without pay was admissible, because the plaintiff must take the authority on the terms on which the assignor held it: *Connor v. Parker*, 114 Mass. 331.

§ 28. Delegation of Delegated Authority, when Permitted.—But an agent may appoint a subagent and delegate his authority to him, where he is authorized to

ciple to the less formal appointments of factors, brokers, and other commercial agents. How much more strongly, then, must the reason and policy of the rule apply to the delegation of authority by the state, to its high public officers, made with the solemnity of a legislative act? The language of the statute, as well as the nature of the trust itself, shows that this is an authority confided to the judgment and discretion of the commissioners themselves, for the impartial discharge of which they are responsible to the state. In this instance, as in similar cases of authority to represent private individuals, the person thus intrusted may have occasion to depend upon scientific or professional advice for the guidance of his own judgment. He may even in matters out of the scope of his own information rely entirely upon the authority of his adviser or assistant. Yet he is still bound to form a judgment for himself, and to assume its responsibility. In this case there was no exercise of any judgment or dis-

cretion whatever by the commissioners; there was merely such a general reliance on the supervision and judgment of the engineer as might amount to an implied delegation of authority, had the commissioner been authorized by law to make such a substitution. But, as the circuit judges before whom the case was tried well stated it, 'it is the judgment of the commissioners, or one of them, which is to determine the propriety of the entry, and not that of the agents,' etc. 'Such is the obvious construction of the statute. A contrary construction would be unreasonable and extravagant. The power conferred is one of the most important character: nothing less than taking of the property of a citizen without his consent. Yet, by the construction contended for, this is conferred upon any and every engineer, superintendent, and agent whom the commissioners may employ, down to the chain-bearers.'

¹ *Underwood v. Birdsell*, 6 Mont. 142.

do so by statute or by contract,¹ and in the following other cases: The delegation of authority by an agent is legal where authorized by custom or the usages of trade.² The legal maxim that an agent cannot delegate his authority to a subagent is not of universal application to factors and commission merchants, and can only be invoked by the principal when sought to be charged by the act of the subagent.³ It is likewise legal where the act delegated is a purely ministerial one,⁴ and does not require the exercise of judgment or discretion.⁵ Thus an authority to receive and pay over money for removing buildings may be delegated by an agent to another.⁶ And where the object of the agency can be best accomplished or can only be accomplished through a subagent, the delegation of authority is proper and legal.⁷ Thus trustees may employ agents where there is a necessity for it.⁸ Bank directors may delegate authority to a committee of their number to convey the real estate of the bank.⁹ Where a draft payable at a distant place is left at a bank for collection, the bank has authority to transmit it to a subagent at such place.¹⁰ And the delegation is legal where the principal is aware that the agent will appoint

¹ *Furnas v. Frankman*, 6 Neb. 429.

² *Lawson on Usages and Customs*, sec. 145.

³ *Harralson v. Stein*, 50 Ala. 347.

⁴ *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Williams v. Woods*, 16 Md. 220; *Commercial Bank v. Norton*, 1 Hill, 501; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116.

⁵ A painter, for example, engaged to paint a portrait could not hand it over to another to do for him. But where an agent is authorized to sell certain land, exercising his discretion as to price and terms, he may properly employ a subagent: *Renwick v. Bancroft*, 56 Iowa, 527. It has been held that a sexton may delegate the performance of his duties to another: *Burial Board v. Thompson*, L. R. 6 Com. P. 445.

⁶ *Grinnell v. Buchanan*, 1 Daly, 538.

⁷ *Johnson v. Cunningham*, 1 Ala. 249; *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177. "When the power given by a person is of such a nature as to require its execution by a deputy, the attorney may appoint such deputy": *Quebec etc. R. R. Co. v. Quinn*, 12 Moore P. C. C. 265; *Laussatt v. Lippincott*, 6 Serg. & R. 386; 0 Am. Dec. 440. A corporation, for example, can only act through agents: *Story on Agency*, sec. 16.

⁸ See Division III., *Trustees*, *post*.
⁹ *Burrell v. Nahant Bank*, 2 Met. 163; 35 Am. Dec. 395.

¹⁰ *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177; *Planters' etc. Bank v. First Nat. Bank*, 75 N. C. 534; *Appleton Bank v. McGilvray*, 4 Gray, 518; 64 Am. Dec. 92.

a deputy,¹ or the delegation is directly or indirectly authorized by him.²

ILLUSTRATIONS.—An insurance policy is signed by a subagent for the regular agent and delivered by the latter, who receives the premium. This is valid: *Grady v. American Cent. Ins. Co.*, 60 Mo. 116. A is authorized by B to sign his name to a subscription paper. C signs A's name to the paper at B's request in his presence. *Held*, valid: *Norwich University v. Denny*, 47 Vt. 13. A broker may authorize his clerk to make and sign a memorandum of contract in his presence, the clerk simply acting ministerially and exercising no discretion: *Williams v. Woods*, 16 Md. 220. A authorized B to borrow money for him of C, and sign his (A's) name to a note therefor. B borrowed the money, and in his presence and at his request D signed the note, "A by D." *Held*, that the note was valid against A: *Weaver v. Carnall*, 35 Ark. 198; 37 Am. Rep. 22.³ A draft left with a bank for collection is payable at a distant city. *Held*, that it must be presumed that it is intended for transmission to a subagent at that place, and not that the bank shall employ its own officers to proceed there and obtain payment: *Dorchester and Milton Bank v. New England Bank*, 1 Cush. 177. A commission merchant is employed to buy goods in a distant market, and the custom of that market is for commission merchants to employ brokers to make such purchases, and this custom is understood by the principal. *Held*, that the commission merchant may properly employ a broker of experience and good reputation to make the purchases, and if he does so, he will not be liable for such broker's errors or misconduct: *Darling v. Stanwood*, 14 Allen, 504. The principal of a line of stages, by letter to one acting as his agent in such business, wrote: "You will do better by getting new drivers, and agents, and horses." The agent employed a subagent, and subsequently the principal was informed of such employment and made no objection. In an action for the wages of the subagent, *held*, that the facts were sufficient to authorize the jury to find the fact of authority in the agent to employ the plaintiff: *McConnell v. McCormick*, 12 Cal. 142.

¹ *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434. portion of his power requiring the exercise of discretion or judgment;

² *Gray v. Murray*, 3 Johns. Ch. 167.

³ "An agent," said English, C. J., in this case, "cannot delegate any duties merely mechanical in their nature."

CHAPTER VI.

RATIFICATION.

- § 29. Unauthorized act of agent may be ratified.
- § 30. But cannot divest vested rights.
- § 31. Act must not be illegal or void.
- § 32. Must have been done on behalf of principal.
- § 33. Principal must be in existence.
- § 34. Ratification must be made with full knowledge of facts.
- § 35. And is then irrevocable.
- § 36. Ratification absolves agent and shifts liability.
- § 37. Appointment of subagent.
- § 38. Ratification must be *in toto*.
- § 39. Acts incapable of ratification.
- § 40. Form of ratification.
- § 41. Acts and conduct show ratification.

§ 29. Unauthorized Act of Agent may be Ratified.—

The unauthorized act of a professed agent may be ratified by the party for whom he pretends to act. After ratification the principal is bound by the act, whether it be for his advantage or detriment, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which would follow the same act done under his previous instructions,¹ and whether he be a natural person or a corporation. For example: If A professes to enter into a contract on my behalf without my authority, and I afterwards ratify it, my ratification relates back so as to have the same effect as if I had authorized A to enter into the contract.² The term "ratified," when used

¹ Evans on Agency, 49.

² Mound City Ins. Co. v. Huth, 49 Ala. 530; Palmer v. Cheney, 35 Iowa, 281; Kelsey v. Nat. Bank, 69 Pa. St. 426; Fleckner v. U. S. B'k, 8 Wheat. 363; Drakely v. Gregg, 8 Wall. 242; Hawley v. Keeler, 53 N. Y. 114; Gulick v. Grover, 33 N. J. L. 463; 97 Am. Dec. 728; Keeler v. Salisbury, 33 N. Y. 648; Grant v. Beard, 50 N. H. 129; Lowry v. Harris, 12 Minn. 255; Lau-

rence v. Taylor, 5 Hill, 107; Forsyth v. Day, 46 Mo. 176; Hawkins v. Baker, 46 N. Y. 666; Chapman v. Lee, 47 Ala. 143; St. Louis Packet Co. v. Parker, 59 Ill. 23; Rich v. State B'k, 7 Neb. 201; 23 Am. Rep. 382; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; 37 Am. Dec. 203; Planters' Bank v. Sharp, 4 Smedes & M. 75; 43 Am. Dec. 470; Everett v. U. S., 6 Port. 166; 30 Am. Dec. 584; Leggett v. New

in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent.¹ Yet persons who deal with a subagent as one having authority have no right as against the principal to set up that he had no authority.² A party may ratify the acts of an agent whose name is unknown to him.³ The rule that a principal cannot be permitted to enjoy the fruits of a bargain, without adopting the instrumentalities of the agent in consummating it, has never been applied where the cause of action was not created by the agent's unauthorized act. If a principal sue upon a security bought without authority, or sue upon a substituted security given for one canceled without authority, he ratifies the agent's act by which the securities were obtained.

Jersey Mfg. Co., 1 N. J. Eq. 541; 23 Am. Dec. 728; Clealand v. Walker, 11 Ala. 1058; 43 Am. Dec. 238; Cilmore v. Wilbur, 12 Pick. 120; 22 Am. Dec. 410; Starks v. Sikes, 8 Gray, 609; 69 Am. Dec. 270; Vincent v. Rafter, 31 Tex. 77; 98 Am. Dec. 516; Carow v. Lillienthal, 50 Ala. 44; Pike v. Douglass, 23 Ark. 99; Whitehead v. Wells, 23 Ark. 99; Roby v. Cosset, 78 Ill. 638; Abbot v. May, 50 Ala. 97; Gold Mining Co. v. Nat. Bank, 96 U. S. 640; Ogden v. Marchand, 29 La. Ann. 61; Sentell v. Kennedy, 29 Id. 679; Francis v. Kerker, 85 Ill. 190; Chamberlain v. Callison, 45 Iowa, 429; Harrod v. McDaniels, 126 Mass. 413; Gibson v. Savings Bank, 69 Me. 579; Curry v. Hall, 15 W. Va. 867; Woods v. Rocchi, 32 La. Ann. 210; Whilden v. Merchant's Bank, 64 Ala. 1; 38 Am. Rep. 1; McDowell v. McKenzie, 65 Ga. 630; Hart v. Dixon, 5 Lea, 336; Sheldon Hat Co. v. Eschmeyer Hat Co., 90 N. Y. 697; Jones v. Atkinson, 68 Ala. 167; Pollock v. Gantt, 69 Ala. 373; 41 Am. Rep. 519; Brooks v. Fletcher, 56 Vt. 624; Myers v. Mut. Ins. Co., 32 Hun, 321; Davis v. Krum, 12 Mo. App. 279; Wallace v. Lawyer, 90 Ind. 499; Breel v. Central City Bank, 6 Col. 235; Mc-

Intyre v. Peek, 11 Gray, 102; 71 Am. Dec. 690; Hamilton v. Phoenix Ins. Co., 106 Mass. 395; Grogan v. San Francisco, 18 Cal. 590; Bell v. Byerson, 11 Iowa, 142; 77 Am. Dec. 142; Taylor v. Connor, 41 Mass. 722; 97 Am. Dec. 419; Culver v. Warren, 36 Kan. 391; Sax v. Drake, 69 Iowa, 769; Gallagher v. Railroad Co., 67 Wis. 529; Goss v. Stevens, 32 Minn. 472. As to time to which ratification of entry by agent relates, see Campbell v. Wallace, 12 N. H. 362; 37 Am. Dec. 219. An extension of the power of the agent without a ratification of the act done will not legalize it: Moore v. Lockett, 2 Bibb, 67; 4 Am. Dec. 683. A contract made in a foreign country by an agent without authority, if ratified by the principal, will be considered as made in the country where the principal resides: Dord v. ... 6 La. Ann. 563; 54 Am. ... 373.

¹ Ellison v. Jackson W. Co., 12 Cal. 542.

² Mayer v. McLure, 36 Miss. 389; 72 Am. Dec. 190.

³ Foster v. Bates, Dan. & Ll. 400; 12 Mees. & W. 226; 7 Jur. 1093; 13 L. J. Ex. 88.

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But where the contract was made by the principal, its performance entitles the principal to payment; and in such case payment to an unauthorized agent cannot be ratified by the principal's bringing action upon the contract; he claims nothing by reason of such payment; he repudiates it entirely.¹ Where an agent authorized to sign notes delegates his power, a ratification by the principal of such note will make it valid, but not a ratification by the agent.² If the court finds as a fact that one person executed a written instrument for another as his attorney in fact, without any power to do so, but that the constituent afterwards expressly ratified the act, the presumption will be that the ratification was in some legal and sufficient mode.³ If a principal ratifies his agent's acts, even for a moment, he is bound by them.⁴ A principal incurs liability in tort as well as in contract by ratifying the acts of his agent.⁵

ILLUSTRATIONS.—One obtains an insurance of the property of another in his possession without instructions so to do. *Held*, that the owner may adopt the policy at any time before or within a reasonable time after a loss: *Watkins v. Durand*, 1 Port. 251. An agent A does a large business with a firm B. A loss is sustained, and on account of A's large and liberal dealings B compromises with him at one fourth. The principal upon whose goods the loss was sustained is entitled to settle with A, upon the same terms, his portion of the loss: *Onsley v. Woolhopter*, 14 Ga. 124. Some of a number of bondsmen employed an attorney for a certain fee to settle suits pending against all, and the others with knowledge of the contract enjoyed the fruits of the compromise. *Held*, that the latter thereby ratified the contract, and were liable with the others for the fee: *Hauus v. Niblack*, 80 Ind. 407. A sold his bankrupt stock in trade to F., agreeing in writing to "do business" in the same shop as agent for F., and not buy on credit without an order in writing from F., who was to take possession when dissatisfied, etc. A., without such order, bought on credit goods of S., who was ignorant of the relation between F. and A.; and F. soon after took pos-

¹ *Boyle v. City of Brooklyn*, 53 Barb. 41.

⁴ *Silverman v. Bush*, 16 Ill. App. 437.

² *Brewster v. Hobart*, 15 Pick. 302.

⁵ *Morehouse v. Northrop*, 33 Conn.

³ *Racouillat v. Sansevain*, 32 Cal. 376. 380; 89 Am. Dec. 211.

session of all the goods, including these, and sold them as his own. *Held*, that this ratified the agent's purchase of S., who could recover the price from F.: *Sartwell v. Frost*, 122 Mass. 184. An agent to sell ordered the purchaser to ship produce in part payment to a third person for sale. *Held*, that the principal after notice could recover the proceeds of the purchase from the third person, as against the creditors of the agent: *Kelley v. Munson*, 7 Mass. 319; 5 Am. Dec. 47. An agent to get a note discounted indorsed it and presented it for discount as his own; the bank discounted it and passed the proceeds to his credit. *Held*, that the bank was responsible to the principal therefor after notice: *Merrill v. Bank of Norfolk*, 19 Pick. 32. An executor sold growing wheat belonging to a widow, supposing it to be his own, and took a note for the price, with an oral agreement for measurement and correction. The widow, with notice that the purchaser claimed that the sale was subject to measurement, accepted the note from the executor and sued it. *Held*, that she was bound by the agreement for measurement. By consenting to adopt the sale, she became bound by its terms: *Carter v. Hamilton*, Seld. Notes, 251; reversing 11 Barb. 147. An agent without authority submitted a claim of his principal to arbitration, and took an award in his own name. The principal accepted an assignment of the award from him, and assigned it again to a third person. *Held*, that he had thereby ratified the agent's acts: *Lowenstein v. McIntosh*, 37 Barb. 251. W. contracted with defendant to put up certain machinery, and ordered a large portion of it from plaintiffs in W.'s name and as his agent. Plaintiffs wrote to defendant for explanations of the order, and defendant answered, declining to interfere with W.'s order, but not in terms repudiating it. Plaintiffs also sent the bill of lading and the articles to defendant, who never returned any of them. *Held*, that upon this evidence the jury might have found that defendant had ratified W.'s order; and the question of ratification ought to have been submitted to them: *Cooper v. Schwartz*, 40 Wis. 54. The defendants' agent pledged their credit to the plaintiffs for goods to be delivered to K., their subcontractor; and the defendants agreed to pay therefor if they had sufficient funds in their hands belonging to K., which they had; K. examined his account with the plaintiffs at the defendant's request, and the defendants delivered a statement thereof to said agent, who proceeded to pay a part of the account. *Held*, that although said agent might have exceeded his authority, the defendants had adopted and ratified his act, and were bound by his promise: *Burgess v. Harris*, 47 Vt. 322. Several persons agreed in writing to take an interest in a voyage, and appointed P. and C. to make purchases; they made them sepa-

rately on credit, and the parties accepted and shipped the goods purchased. *Held*, that the separate purchases were ratified, and that subsequent signers of the contract were bound as ratifying the purchases: *French v. Price*, 24 Pick. 13. H. embezzled certain bonds belonging to W., and pledged them to M. to secure payment of borrowed money. After W. was informed that the bonds had been so pledged, he took H.'s note for them, and afterwards obtained judgment against him on the note. In a suit by W. against M. to recover the bonds, *held*, that by his previous acts W. had ratified the pledge and could not recover: *Warneken v. Marchand*, 18 La. Ann. 147. P., acting without authority from H., sells land of H., receiving a promissory note for the price thereof, and H. receives the note and indorses it to a third party. *Held*, that such action of H. is a ratification of the acts of P., and makes the contract binding upon H., and he is estopped from denying the original authority or ratification: *Moore v. Pendleton*, 16 Ind. 481. M. stored corn in the warehouse of F., who, as M. alleged, sold it without authority. All of the purchase-money except the amount of a purchase made by S. was tendered to M. by F., and at the same time M. was informed that all the corn had been sold; no special mention, however, was made of the sale to S. M. accepted the money tendered. *Held*, a ratification of all the sales, including that to S.: *Seago v. Martin*, 6 Heisk. 308.

§ 30. But cannot Divest Vested Rights.—But a ratification of an unauthorized act cannot divest rights acquired by third persons, or subject them to losses.¹ "Although the general rule is that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or as the maxim is, *Omnis ratihabito retrotrahitur*, yet this doctrine is not universally applicable. Thus, if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights."² A ratification cannot change the character of the instrument upon which it is indorsed to the extent of supplying a title where

¹ *Stoddard v. U. S.*, 4 Ct. of Cl. 511; *Bellmer*, 57 Cal. 12; *Fowler v. Pearce*, 53 Am. Dec. 481. *McMahan v. McMahan*, 13 Pa. St. 376; 49 Ill. 59; *Pollock v. Cohen*, 32 Ohio St. 514; *contra*, *Persons v. McKibben*, 5 Ind. 261; 61 Am. Dec. 85.

² *Wood v. McCain*, 7 Ala. 800; 42 Am. Dec. 612; and see *Wittenbrock v.*

there is none in fact.¹ Thus a mortgage by a married woman of goods of which she avouches herself therein to be the owner, but which really belong to her husband, passes no such title as to enable the mortgagee to replevy them from a third person, although the husband has indorsed on the mortgage that he formally sanctions and ratifies his wife's action, "she having been my agent for the transaction of business."² So where goods have been intrusted to an agent for a special purpose, and have been wrongfully sold by him, their owner cannot by ratifying his act maintain an action by contract against the purchaser for goods sold and delivered, but must sue in tort.³

ILLUSTRATIONS.—A person in possession of the property of another, without the knowledge of the owner, exchanged it for other property, and gave his individual note for the difference without disclosing the real ownership. The owner afterwards received the property so taken in exchange. *Held*, that if the payee of the note, after learning the fact that the maker acted as agent in the transaction, failed to notify the principal that he should look to him for the payment of the note until after the principal had settled with the agent, and in such settlement had paid the agent the amount of the note, the principal was thereby discharged from any liability to the payee: *Fowler v. Pearce*, 49 Ill. 59.

§ 31. **Act must not be Illegal or Void.**—The act must not be illegal or void.⁴ Thus where an officer without authority undertook to appoint an appraiser for creditors without first levying on the land of the debtor, the levy was void, and it was held not made good by the creditors'

¹ *Lewis v. Buttrick*, 102 Mass. 412.

² *Lewis v. Buttrick*, 102 Mass. 412.

³ *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227; 79 Am. Dec. 781.

⁴ *Story on Agency*, sec. 240; *Evans on Agency*, 50; *Seery v. Sprayfield*, 112 Mass. 512; *O'Connell v. Arnold*, 53 Ind. 205; *Armitage v. Widoe*, 36 Mich. 124; *Board of Supervisors v. Arrighi*, 54 Miss. 668; *Newsom v. Hart*, 14 Mich. 237. In *Mason v. Caldwell*, 5 Gilm. 196, 48 Am. Dec. 330, Caton, J., said: "A contract which was absolutely void as to all parties, which conferred

no rights and created no liabilities of any sort, could not, I imagine, be adopted by any one so as to make it valid and binding." The act of directors of a corporation going beyond their powers cannot be ratified by the stockholders: *Ashbury & Co. v. Riche*, L. R. 7 H. L. 653; *Price v. Grand Rapids R. R. Co.*, 13 Ind. 58; *McCracken v. City of San Francisco*, 16 Cal. 591. But *aliter*, where the directors act irregularly, but within their powers: *State v. Tormus*, 26 Minn. 1.

acceptance of seisin.¹ So where a committee were empowered to sell a school-house, a sale on credit instead of cash was held void, and not ratified by lapse of time or the removal of the school-house.² So a sheriff cannot legally be a purchaser at his own sale either for himself or for another, and his act in doing so cannot be ratified.³ It is held in England that a person cannot ratify a forgery of his name;⁴ while in the United States in a number of decisions it is laid down that he can.⁵ And the government has been held liable for the illegal acts of its officers which it adopts.⁶

§ 32. Must have been Done on Behalf of Principal.—

The act must have been done by the agent *on behalf* of the person who ratifies it. This principle is as old as the Year-books,⁷ where this is put: "If a bailiff take a *heriot*, claiming property in it himself, the subsequent assent of the lord would not amount to a ratification; but if he takes it as the bailiff of the lord, the subsequent assent amounts to a ratification of the bailiff's act."⁸ Thus, where suit was brought against the general agent of a sewing-machine company for a forcible trespass committed by employees while removing a machine by his direction, and in com-

¹ Richardson v. Payne, 114 Mass. 429.

² School District v. Aetna Life Ins. Co., 62 Me. 330; Fitzpatrick v. School Commissioners, 7 Humph. 224; 46 Am. Dec. 76.

³ Harrison v. McHenry, 9 Ga. 164; 52 Am. Dec. 435.

⁴ Brook v. Hook, L. R. 6 Ex. 79; McKenzie v. British Linen Co., 6 App. Cas. 82.

⁵ Thome v. Bell, Lalor, 430; Howard v. Duncan, 3 Lans. 174; Forsyth v. Day, 46 Me. 176; Fitzpatrick v. Commissioners, 7 Humph. 224; 46 Am. Dec. 76; Union B'k v. Middlebrook, 33 Conn. 95; Garrett v. Gonter, 42 Pa. St. 143; Livings v. Wiler, 32 Ill. 387; Wellington v. Jackson, 121 Mass. 157; Turner v. Keller, 66 N. Y. 60;

Charles River B'k v. Davis, 100 Mass. 413; Casco Bank v. Keene, 53 Me. 103. But *aliter*, Shesler v. Vandyke, 92 Pa. St. 447; 37 Am. Rep. 702, and note p. 701.

⁶ Wiggins v. United States, 3 Ct. of Cl. 412.

⁷ Hen. IV., 35.

⁸ Vanderbilt v. Turnpike Co., 2 N. Y. 479; 51 Am. Dec. 315; Brainerd v. Dunning, 30 N. Y. 211; Alldred v. Bray, 41 Mo. 484; Collins v. Waggoner, Breese, 26; Bevenoge v. Rawson, 51 Ill. 504; Grund v. Van Vleck, 69 Ill. 479; Condit v. Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; Farmers' Loan etc. Co. v. Walworth, 1 N. Y. 433; Commercial Bank v. Jones, 18 Tex. 811; Collins v. Swan, 7 Robt. 623; Richardson v. Payne, 114 Mass. 429.

pliance with the orders of the company, from the premises of one who held it under a sewing-machine lease, which had been forfeited, it was held that he was not liable, although he afterwards ratified the acts of the employees.¹ There is no rule that one of two joint agents is deemed to ratify the separate, unauthorized act of the other, so as to render both liable for it, by mere failure to repudiate it.²

§ 33. Principal must be in Existence.—But it is not a ratification where the principal is not in existence when the unauthorized transaction took place.³ Where a person enters into a contract as promoter or trustee on behalf of a corporation not yet formed, and the company, when formed, adopts his acts, this is making a new contract, and not ratifying the existing one.⁴ Yet if the company has received the full benefit of a contract made before incorporation by its individual members, it will be bound by it.⁵ Where A does an act as agent for B without any communication with C, C cannot, by afterwards adopting that act, make A his agent, and thereby incur any liability, or take any benefit under the act of A.⁶

§ 34. Ratification must be Made with Full Knowledge of Facts.—And the ratification is binding only when

¹ Smith v. Lozo, 42 Mich. 6.

² Penn v. Evans, 28 La. Ann. 576.

³ Watson v. Swan, 11 Com. B., N. S., 771.

⁴ Melhado v. Porto Alegre Co., L. R. 9 Com. P. 503; In re Empress Engineering Co., 10 Ch. Div. 125; Kelner v. Baxter, L. R. 2 Com. P. 174; Marchant v. Loan Ass'n, 26 La. Ann. 389; Stainsby v. Frazer's Life Boat Co., 3 Daly, 98; Rockford etc. R. R. Co. v. St. Louis R. R. Co., 65 Ill. 328; Western Screw Co. v. Cousley, 72 Ill. 531. But see Frankfort etc. Co. v. Churchill, 6 T. B. Mon. 427; 17 Am. Dec. 159.

(A ratification of an unauthorized contract of reinsurance or double insurance must be made before the loss has occurred: Alliance Ins. Co. v. Louisiana Ins. Co., 8 La. 1; 28 Am. Dec. 117.)

⁵ Edwards v. Grand Junction R. R. Co., 1 Mylne & C. 650; Bell's Gap R. R. Co. v. Christy, 79 Pa. St. 54; 21 Am. Rep. 39; Grape Sugar Mfg. Co. v. Small, 40 Md. 395; Bell v. McAboy, 3 Brewst. 81.

⁶ Wilson v. Tummon, 6 Scott N. R. 894; 1 Dowl. & L. 513.

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made with a full knowledge of all the material circumstances.¹

ILLUSTRATIONS. — Agents of an insurance company receive money for insuring iron, which they transmit to the company, by whom it is accepted. *Held*, not a ratification of an unauthorized contract made by the agents for the company, unless the company knew on what account the money was received, and the terms of the contract: *Etna Ins. Co. v. North Western Iron Co.*, 21 Wis. 458. An agent for the sale of real estate exceeded his instructions in selling a part of the property in regard to which he was authorized only to negotiate for a sale, and his principal afterwards impliedly ratified all his acts by receiving the money for the sale of all the land, but it appeared that he did not know that the portion in question had been sold. *Held*, that the agreement of the agent was neither authorized nor ratified: *Lester v. Kinne*, 37 Conn. 9. A landlord authorized bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm; the cattle were sold, and the landlord received the proceeds. *Held*, that the landlord was not liable for the value of the cattle, unless he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts: *Lewis v. Read*, 13 Mees. & W. 834; 14 L. J. Ex. 295. II. and W., the agents of a railroad company, represented to a land-

¹ *Bank of Owensboro v. Western Bank*, 13 Bush, 526; 26 Am. Rep. 211; *Spooner v. Thompson*, 48 Vt. 259; *Pittsburg etc. R. R. Co. v. Gaz- zam*, 32 Pa. St. 340; *Humphreys v. Havens*, 12 Minn. 298; *Combs v. Scott*, 12 Allen, 493; *Manning v. Gash- arie*, 27 Ind. 399; *Dodge v. McDonald*, 14 Wis. 535; *Etna Ins. Co. v. Iron Co.*, 21 Wis. 458; *Hardeman v. Ford*, 12 Ga. 205; *Mapp v. Phillips*, 32 Ga. 72; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235; *Williams v. Storm*, 6 Cold. 333; *Tedrick v. Rice*, 13 Iowa, 214; *Bell v. Cunningham*, 3 Pet. 69; *Owings v. Hall*, 9 Pet. 637; *Holder- ness v. Baker*, 44 N. H. 414; *Copeland v. Ins. Co.*, 6 Pick. 202; *Dickinson v. Conway*, 487; *Day v. Holmes*, 103 Mass. 336; *Lester v. Kinne*, 37 Conn. 8; *Hankin v. Baker*, 46 N. Y. 660; *Walters v. Munroe*, 17 Md. 150;

77 Am. Dec. 328; *Adams Exp. Co. v. Trego*, 35 Md. 419; *Maxey v. Heck- thorn*, 44 Ill. 437; *Reynolds v. Feece*, 86 Ill. 570; *Miller v. Board of Educa- tion*, 44 Cal. 166; *Bannon v. Wartfield*, 42 Md. 42; *Bosscau v. O'Brien*, 4 Biss. 395; *Thompson v. Craig*, 16 Abb. Pr., N. S., 29; *Kerr v. Sharp*, 83 Ill. 199; *Stein v. Kendall*, 1 Brad. (Ill.) 103; *Snow v. Grace*, 29 Ark. 131; *Hunt v. Marple*, 2 Brad. (Ill.) 402; *Fouch v. Wilson*, 59 Ind. 93; *Rich v. Smith*, 82 N. Y. 627; *Hoffman v. Livingston*, 46 N. Y. Sup. Ct. 552; *Dean v. Bassett*, 57 Cal. 640; *Roberts v. Rumley*, 58 Iowa, 301; *Hovey v. Brown*, 59 N. H. 114; *Herring v. Skaggs*, 73 Ala. 446; *Gulick v. Grover*, 33 N. J. L. 403; 97 Am. Dec. 728; *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Bohart v. Oberne*, 36 Kan. 284.

owner that the company, in consideration of the conveyance of the right of way, would construct a crossing over their embankment. *Held*, that the company by accepting the deed ratified what was done by H. and W. in their behalf; and although it is true that no one is bound by his ratification of what has been done in his behalf unless he is informed of all the circumstances, yet he cannot avail himself of the benefit of the act except *cum onere*: *Morris and Essex R. R. Co. v. Green*, 15 N. J. Eq. 470. An agent, without the knowledge of the principal, loans his principal's money to a third person, and afterwards makes a note in the principal's name, without his knowledge, for a larger sum, which is discounted for the accommodation of such third person, and out of the proceeds of such discount the agent is repaid the sum so loaned, and applies it to the principal's benefit. *Held*, that if the principal, immediately on being notified of the use of his name to such accommodation paper, disavows the act of the agent, he is not to be held to have ratified the act of the agent because he does not voluntarily offer to restore the money which was paid to the agent out of the proceeds of such discount in payment of such unauthorized loan: *Gulick v. Grover*, 33 N. J. L. 464; 97 Am. Dec. 728.

§ 35. **And is then Irrevocable.**—And a ratification once thus made cannot be revoked by the principal.¹ There is, as has been well said, no *locus pœnitentiæ*.²

§ 36. **Ratification Absolves Agent, and Shifts Liability.**—The ratification by the principal absolves the agent from all liability, and estops the principal from claiming damages against the agent for his unlawful interference.³ So, too, the principal becomes solely liable for the act as though he had originally authorized it, for all the responsibilities are shifted from the agent to the principal,⁴ and the principal may, in like manner, bring suit on the

¹ *Clark v. Van Riemsdyk*, 9 Cranch, 153; *Bell v. Byerson*, 11 Iowa, 233; 77 Am. Dec. 142; *Hazleton v. Batchelder*, 44 N. Y. 40; *Breck v. Jones*, 16 Tex. 441; *Beall v. January*, 62 Mo. 434; *Andrews v. Ætna Ins. Co.*, 92 N. Y. 596.

² *Evans on Agency*, 65.

³ *Meehan v. Forrester*, 52 N. Y. 277; *McCracken v. San Francisco*, 16 Cal. 591; *Cairnes v. Bleecker*, 12 Johns. 300; *Owing v. Hull*, 9 Pct. 607; *Thorndike*

v. Godfrey, 3 Greenl. 429; *Towle v. Johnson*, 1 Johns. Cas. 110; *Farwell v. Meyer*, 35 Ill. 41; *Bray v. Gunn*, 53 Ga. 144; *Woodward v. Suydam*, 11 Ohio, 360; *Meyer v. Morgan*, 51 Miss. 21; 24 Am. Rep. 617.

⁴ *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146; *Lucas v. Barrett*, 1 G. Greene, 511; *Lent v. Padelford*, 10 Mass. 230; 6 Am. Dec. 119; *Rogers v. Kneeland*, 10 Wend. 218; *Clark v. Van Rennsdyk*, 9 Cranch, 153; *Roby v.*

contract,¹ and the agent becomes entitled to the same rights and compensation as if his act had been originally authorized.² When, however, the principal, to prevent greater loss to himself, is forced to assume the agent's act, it will not prevent his remedy against the agent. Therefore, where an agent to collect money was instructed to remit by express, and, instead, bought a check on New York, which the principal forwarded to New York for payment, but before it reached there the drawers became insolvent, and the check was dishonored, it was held that sending the check to New York was not a ratification of the act of the agent in buying the check, and he was liable for the loss incurred.³ And where an agent to loan money takes insufficient security, the principal may keep the security, and hold the agent liable for any deficiency.⁴

§ 37. **Appointment of Subagent.**—If an agent improperly appoints a subagent, the ratification of the acts of the subagent by the principal will bind him in the same manner as though he had originally given the agent authority to delegate the execution of his orders.⁵ But it will create no liability on the principal's part to pay for the services of the subagent.⁶

§ 38. **Ratification must be in Toto.**—The ratification must be entire; the principal cannot ratify part of the agent's acts and reject part.⁷ If he ratifies what is to his interest, he must also assume that which is against his

Cossett, 78 Ill. 638; *Bray v. Gunn*, 35 Ga. 141; *Palmer v. Stephens*, 1 Denio, 472; *Mason v. Caldwell*, 5 Gilm. 196; 43 Am. Dec. 330; *Violet v. Powell*, 10 B. Mon. 347; 52 Am. Dec. 548; *contra*: *Rossiter v. Rossiter*, 8 Wend. 494, 24 Am. Dec. 62, to the effect that after the ratification the agent will still be liable to the party with whom he contracted.

¹ Story on Agency, sec. 244.

² *Hopkins v. Mollineux*, 4 Wend. 463.

³ *Walker v. Walker*, 5 Heisk. 425.

⁴ *Bank of Owensboro v. Western Bank*, 13 Bush, 526; 26 Am. Rep. 211.

⁵ *Strickland v. Hudson*, 55 Miss. 235.

⁶ *Homan v. Brooklyn Ins. Co.*, 7 Mo. App. 22.

⁷ *Bennett v. Judson*, 21 N. Y. 238; *Ewell v. Chamberlain*, 31 N. Y. 611; *Crans v. Hunter*, 23 N. Y. 389; *Farmers' Loan Co. v. Walworth*, 1 N. Y. 433; *Benedict v. Smith*, 10 Paige, 126; *Newell v. Hurlburt*, 2 Vt. 351; *Cole-*

interest.¹ The law does not permit a principal to adopt an agent's unauthorized act, so far as it is beneficial, and reject the residue. By adopting a part he becomes bound by the whole.² The fact that a person receives from a broker the profits of a transaction in buying and selling stocks upon a margin does not amount to a ratification of another transaction in the purchase and sale of stocks between the same parties which has resulted in a loss.³ If the ratification is made under a mistake or in ignorance of the full range of the agent's act, it is voidable to the extent of the mistake.⁴

ILLUSTRATIONS.—A sells to B two mules belonging to C. C ratifies the sale by accepting the purchase price. C is bound by the agent's warranty of the soundness of the mules: *Cochran v. Chitwood*, 59 Ill. 53. A stored corn with B, who sold it without authority, but handed over the purchase-money to A, except the amount due for one lot sold to C. A accepted the money. *Held*, that he thereby ratified all the sales, including the one to C: *Seago v. Martin*, 6 Heisk. 308. An agent authorized to loan his principal's money contracted for usurious interest. *Held*, that the principal could not affirm the contract for the legal interest only: *Joslin v. Miller*, 14 Neb. 91.

man v. Stark, 1 Or. 115; *Henderson v. Cummings*, 44 Ill. 325; *Cochran v. Chitwood*, 59 Ill. 53; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Widner v. Lane*, 14 Mich. 124; *Knox v. Western College*, 31 Iowa, 547; *Menkins v. Watson*, 27 Mo. 163; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235; *Hardeman v. Ford*, 12 Ga. 205; *Drennan v. Walker*, 21 Ark. 539; *Fowler v. Gold Exchange*, 67 N. Y. 138; *Babcock v. De Ford*, 14 Kan. 408; *Taylor v. Conner*, 4 Miss. 722; 97 Am. Dec. 419.

¹ *Odiorno v. Maxey*, 13 Mass. 182; *New England Ins. Co. v. De Wolf*, 8 Pick. 63; *Skinner v. Dayton*, 19 Johns. 554; 10 Am. Dec. 286; *Fowler v. Trull*, 1 Hun, 409; *Cochran v. Chitwood*, 59 Ill. 53; *Bennett v. Judson*, 21 N. Y. 238; *Mundorff v. Wickersham*, 63 Pa. St. 87; *Romozetti v. Bowring*, 7 Com. B. N. S., 851. A debtor cannot have the benefit of a compromise made by an agent with his creditors without adopting all the representations made by the agent in negotiating the same: *Crans*

v. Hunter, 28 N. Y. 389. A principal cannot say that he will ratify the act "if he receive no harm thereby"; he must repudiate absolutely, or be bound absolutely: *Fort v. Coker*, 11 Heisk. 579.

² *Farmers' Loan and Trust Co. v. Walworth*, 1 N. Y. 433, reviewing 4 Sand. Ch. 51; *Dexter v. Adams*, 1 How. App. Cas. 771, 793; *Cobb v. Dows*, 10 N. Y. 335; *Story on Agency*, sec. 250; *Bell v. Shibley*, 33 Barb. 610; *Ferguson v. Hamilton*, 35 Barb. 427; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 88; 38 Barb. 534; *McClure v. Briggs*, 58 Vt. 52; 56 Am. Rep. 557; *Rudasill v. Falls*, 92 N. C. 222.

³ *Todd v. Bishop*, 136 Mass. 386.

⁴ *Smith v. Tracy*, 36 N. Y. 79; *Baldwin v. Burrows*, 47 N. Y. 190; *Lester v. Kinne*, 37 Conn. 9. Thus if a person pays on behalf of another more than he was authorized to do, a ratification of his act made under a misapprehension will be relieved against *pro tanto*: *Miller v. Board of Education*, 44 Cal. 166.

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§ 39. **Acts Incapable of Ratification.**— "Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule [that the principal may ratify an unauthorized act] seems generally applicable. . . . On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third person to the consequences."¹ The cases cited in illustration of this rule by Story are the case of a lease containing a condition for determination by either party on six months' notice, such notice being given by an unauthorized agent;² the case of a demand by one without authority on a debtor for a debt;³ a notice of dishonor of a note;⁴ and others. The ground upon which this is put is, that in these cases the advantage is all with the principal; he may play fast and loose; he may adopt the agent's acts, if he subsequently thinks it beneficial to him, and repudiate them if otherwise. So it has been held in Louisiana that the ratification of an unauthorized contract of reinsurance or double insurance must be made before the loss occurs, or it will be of no avail.⁵

§ 40. **Form of Ratification.**—As to the form in which the ratification is made, it may be express or implied. But if the act of the agent is done by an instrument which is

¹ Story on Agency, secs. 245, 246.

² Buson v. Denman, 2 Ex. 167; Lyster v. Goldwin, 2 Ad. & E., N. S., 143.

³ Coore v. Callaway, 1 Esp. 83; Free-

man v. Boynton, 7 Mass. 483.

⁴ Tindal v. Brown, 1 Term Rep. 167; Stanton v. Blossom, 14 Mass. 116.

⁵ Alliance Ass. Co. v. State Ins. Co., 8 La. 1; 23 Am. Dec. 117.

required by law to be under seal, then the principal's ratification must be under seal also.¹ But if the agent unnecessarily affix a seal, and, as we have seen, it operates as an unsealed instrument, the ratification need not be under seal.²

§ 41. Acts and Conduct.—From the acts and conduct of the principal, a ratification may be shown. It is not essential that the principal should declare the act confirmed by him in so many words.³ The acts and conduct of the principal are always construed liberally in favor of the agent.⁴ Where the acts and conduct of the principal are quite inconsistent with anything else but a ratification, the presumption of ratification is almost conclusive.⁵ When the unauthorized act of an agent is done

¹ *Blood v. Goodrich*, 9 Wend. 63; 24 Am. Dec. 121; 12 Wend. 565; 27 Am. Dec. 152; *Hanford v. McNair*, 9 Wend. 57; *Spofford v. Hobbs*, 29 Me. 148; 48 Am. Dec. 521; *Reese v. Medlock*, 27 Tex. 120; 81 Am. Dec. 611; *Boyd v. Dobson*, 5 Humph. 37; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Taylor v. Robinson*, 14 Cal. 400; *Peterson v. Mayor*, 4 E. D. Smith, 417; *Vanderbilt v. Peisse*, 3 E. D. Smith, 430; *McDowell v. Simpson*, 3 Watts, 129; 29 Am. Dec. 338; *Bellas v. Hays*, 5 Serg. & R. 427; 9 Am. Dec. 385; *Stetson v. Patten*, 2 Greenl. 358; 11 Am. Dec. 111. An antedated power of attorney is a good ratification of a bond executed by a professed agent: *Millikin v. Coombs*, 1 Greenl. 343; 10 Am. Dec. 70; *contra: Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *McNaughton v. Partridge*, 11 Ohio, 223; 33 Am. Dec. 371. And in partnership transactions—that is, where one member, without authority, attempts to bind the firm by deed—it seems that a parol ratification will do: See cases cited in 27 Am. Dec. 343. In a late case in Massachusetts it is said to be “settled in this commonwealth that the unauthorized execution of a deed in the nature either

of a partnership or of an individual may be ratified by parol”: *Holbrook v. Chamberlain*, 116 Mass. 155; 17 Am. Rep. 146.

² See *ante*, chapter 3, and *Ledbetter v. Walker*, 31 Ala. 175; *Bates v. Best*, 13 B. Mon. 215. But an action of covenant would not lie on such an instrument: *Hanford v. McNair*, 9 Wend. 54.

³ *Lovejoy v. Middlesex R. R. Co.*, 128 Mass. 480; *Hawkins v. Lange*, 22 Minn. 557; *Codwise v. Hacker*, 1 Caines, 526; *Cooper v. Schwartz*, 40 Wis. 54; *Leaving v. Butler*, 69 Ill. 575; *Ward v. Williams*, 26 Ill. 447; 79 Am. Dec. 385; *Szymanski v. Plassan*, 20 La. Ann. 90; 96 Am. Dec. 382.

⁴ *Codwise v. Hacker*, 1 Caines, 526; *Lorraine v. Cartwright*, 3 Wash. C. C. 151; *Terrill v. Flower*, 6 Mart. 584; *Bryne v. Doughty*, 13 Ga. 46; *Cairo etc. R. R. Co. v. Mahoney*, 82 Ill. 73; 25 Am. Rep. 299.

⁵ *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 543; *Horton v. Townes*, 6 Leigh, 47; *Crocker v. Appleton*, 25 Me. 131; *Barnard v. Wheeler*, 24 Me. 412; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; and so where it is manifestly for the principal's benefit: *Flemming v. Marine Ins. Co.*, 4 Whart. 59; 33 Am. Dec. 33.

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in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. The duty to disaffirm at once, on knowledge of the act, is said to be more imperative in such cases, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relations already established between them.¹ Silence may raise the presumption of a ratification. A principal who knows of an unauthorized act having been done by his agent must give notice of his dissent within a reasonable time, or his assent to and ratification of the act will be presumed.² He need not disavow the act the instant he has notice of it,³ but he must do so as soon as he reasonably can.⁴ So accepting the benefits of the act of an authorized agent is a ratification of his authority,⁵ provided, of course,

¹ Harrod v. McDaniels, 126 Mass. 413, 415.

² Erick v. Johnson, 6 Mass. 193; Amory v. Hamilton, 17 Mass. 103; Kingsland v. Kincaid, 1 Wash. C. C. 454; Courcier v. Ritter, 4 Wash. C. C. 549; Towle v. Stevenson, 1 Johns. Cas. 110; Armstrong v. Gilchrist, 2 Johns. Cas. 424; Forrestier v. Boardman, 1 Story, 43; Maddux v. Beavan, 39 Md. 485; Cairnes v. Bleecker, 12 Johns. 300; Law v. Cross, 1 Black, 533; Johnson v. Wingate, 29 Me. 404; Fainell v. Howard, 26 Iowa, 381; Williams v. Merritt, 23 Ill. 623; Jervis v. Hoyt, 2 Hun, 637; Pickett v. Pearson, 17 Vt. 470; Hammond v. Hoyt, 52 Tex. 63; Smith v. Sheehy, 12 Wall. 358; State v. Smith, 48 Vt. 266; Lee v. Fontaine, 10 Ala. 755; 44 Am. Dec. 505; Philadelphia etc. R. R. Co. v. Cowell, 28 Pa. St. 329; 70 Am. Dec. 128; contra, Bosseau v. O'Brien, 4 Biss. 395; Ward v. Williams, 26 Ill. 477; 79 Am. Dec. 385; White v. Langdon, 30 Vt. 599; Ladd v. Hildebrandt, 27 Wis. 135; 9 Am. Rep. 445.

³ Miller v. Excelsior Stone Co., 1 Ill. App. 773; Robinson v. Chapline, 9 Iowa, 91; Walters v. Munroe, 17

Md. 150; 77 Am. Dec. 328; Dupont v. Wetherman, 10 Cal. 354.

⁴ Peck v. Ritchey, 66 Mo. 114; Walker v. Walker, 7 Baxt. 260; Western etc. R. R. Co. v. McElwee, 6 Hoisk. 208; Richmond Mfg. Co. v. Stark, 4 Mason, 296; Vianna v. Barclay, 3 Cow. 281; Curry v. Hale, 15 W. Va. 367; Bredin v. Dubarry, 14 Serg. & R. 30; Bonneau v. Poydras, 2 Robt. 1; Lartigue v. Peet, 5 Robt. 91. Of course he must have knowledge of the act: Walters v. Munroe, 17 Md. 150; 77 Am. Dec. 328.

⁵ Gibson v. Norway Savings Bank, 69 Me. 579; Woodbury v. Learned, 5 Minn. 339; Ketchum v. Verdell, 42 Ga. 534; Hall v. Harper, 17 Ill. 82; Ballston Spa Bank v. Marine Bank, 16 Wis. 129; Williams v. Stone, 6 Cold. 203; Richmond Mfg. Co. v. Starks, 4 Mason, 296; Lyndeborough Glass Co. v. Glass Mfg. Co., 111 Mass. 315; Wilkins v. Hollingsworth, 6 Wheat. 241; Forrestier v. Boardman, 1 Story, 43; Edie v. Ashbaugh, 44 Iowa, 519; Gold Mining Co. v. Nat. Bank, 96 U. S. 640; Walnutt Bank v. Farmers' Co., 16 Wis. 629; Darst v. Gale, 83 Ill. 136; Brown v. La Crosse

the principal is aware of all the material facts of the case.¹ In *Bryant v. Moore*,² it is said: "There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. This will not be the case when the knowledge that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. If, for instance, a merchant should authorize a broker by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant when he received the goods, if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price. But if he had received the goods without knowledge that they had been purchased at an advanced price, he would not be obliged to restore them or pay such advanced price if he could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, and he should bear the loss. When the plaintiff in this case was first informed that his agent had exceeded his authority, he had lost the services of the oxen for two months and a half; and the agent was present and denied that he had made the warranty. The defendant appears to have been sensible that the plaintiff

City Gas Co., 21 Wis. 51; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *Perry v. Mulligan*, 58 Ga. 479; *Pike v. Douglass*, 28 Ark. 59; *Sartwell v. Frost*, 122 Mass. 184; *Ogden v. Marchand*, 29 La. Ann. 61; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728.

¹ *Pennsylvania etc. R. R. Co. v. Dan-*

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would then suffer loss by a rescission of the contract, and to have offered compensation therefor. Whether the offer was a reasonable one or not is immaterial, for the plaintiff under such circumstances was not obliged to rescind. He does not appear to have made any movement in the first instance to effect the exchange, or to have desired it, or to have been in fault, when first informed of the warranty. The defendant could not at that time prescribe the terms upon which the contract should be rescinded, or insist upon it." Accepting a guaranty of a premium note by a person who had become assignee of the policy, with the consent of the company signified by the signature of the secretary only, is a ratification of his authority to signify their assent.¹ One who uses a carriage, hired in his name by another without previous authority or subsequent ratification, without reasonable cause to believe that the carriage was hired on his account, or that he was looked to for pay for its use, is not liable for its use, although the owner had no notice that the hirer procured it on his own account.² Suing the purchaser, for example, for the debt or on the contract,³ or suing the agent for the money received,⁴ or defending a suit brought to recover land acquired through the agent,⁵ is a ratification. Bringing a writ of entry is a ratification of a previous entry on the land made by only one of two agents appointed for that purpose.⁶ An

¹ New England Ins. Co. v. De Wolf, 8 Pick. 56.

² Adams v. Bourne, 9 Gray, 100.

³ Copeland v. Ins. Co., 6 Pick. 198; Dodge v. Lambert, 2 Bosw. 570; Ham v. Boody, 20 N. H. 411; 51 Am. Dec. 235; Partridge v. White, 56 Me. 564; Drennan v. Walker, 21 Ark. 539; Harris v. Miner, 21 Ark. 539; Payne v. Smith, 12 N. H. 34; Beidman v. Godell, 56 Iowa, 592; or adopting an action founded on the agent's act: Town of Grafton v. Fallansbee, 16 N. H. 450; 41 Am. Dec. 736; so it may be ratified by an admission in an an-

swer in chancery: Stoney v. Shultz, 1 Hill Ch. 465; 27 Am. Dec. 429. But see Cooley v. Perrine, 41 N. J. L. 322; Carew v. Lillenthal, 50 Ala. 44; Peters v. Ballister, 3 Pick. 495.

⁴ Story on Agency, sec. 259; Zino v. Verdelle, 9 La. 51; Bank of Beloit v. Beale, 43 N. Y. 473; Frank v. Jenkins, 22 Ohio St. 526; Shiras v. Morris, 3 Cow. 60; President v. Barry, 17 Mass. 97; Keyser v. Wells, 60 Ind. 261. But see Lee v. West, 47 Ga. 311.

⁵ Lathrop v. Commercial Bank, 8 Dana, 113; 33 Am. Dec. 481.

⁶ Sutton Parish v. Cole, 3 Pick. 232.

action of *assumpsit* for the proceeds of an unauthorized sale, which was discontinued before trial because the remedy was erroneous, was held no ratification of the sale, to bar an action of trover for the same cause.¹ Where a principal expressly repudiates the unauthorized act of his agent, delay in bringing a necessary suit cannot be deemed a ratification.²

ILLUSTRATIONS. — CASES IN WHICH RATIFICATION WAS IMPLIED. — A husband, to secure a debt of his own, mortgaged his wife's property. The mortgagee, in the presence of the wife, threatened to foreclose, and demanded fresh security. The wife replied: "What more do you want? You have a mortgage on all the personal property already." Held, a ratification of the husband's act: *Merrill v. Parker*, 112 Mass. 250. A principal, on being informed of a purchase by his agent, complained of the manner in which it had been made, but did not deny the agent's authority. Held, that he had admitted it: *Johnson v. Jones*, 4 Barb. 369. The parties named in a submission to arbitration signed by attorneys appeared and testified. Held, that this was a ratification by them of the submission: *Blakely v. Graham*, 111 Mass. 8. An attorney without authority received a bond in settlement of a debt. The subsequent silence of the client raises a presumption of his ratification: *Maddux v. Beaven*, 39 Md. 485. An agent without authority compromises a debt due his principal. The principal, knowing of the fact, says nothing. He will be bound by the agent's act: *Armstrong v. Gilchrist*, 2 Johns. Cas. 424. An agent sells his principal's goods to his own firm. This is beyond his authority, but the principal by acquiescing in it will be held to have ratified it: *Francis v. Kerker*, 85 Ill. 190. F. sold S.'s hops to P., pretending he had authority. P. soon after told S. of it, when S., instead of disavowing F.'s authority, requested P. to help him to recover the money P. had paid him. Held, that this was a ratification of F.'s act: *Pitts v. Shubert*, 11 La. 286; 30 Am. Dec. 718.³ An under-agent of a mining company leased a right to mine in a certain range. The company afterwards accepted the rents. This was a ratification of the agent's un-

¹ *Peters v. Billistier*, 3 Pick. 495.

² *McClure v. Ewartson*, 14 Leigh, 495.

³ "If the plaintiff intended to disavow the sale by F., he ought to have done so immediately on his arrival. He ought not to have played fast and loose, and induced the defendant to forego the immediate pursuit of F.

No principle is better settled than that he who is notified that a contract has been made for him, and subject to his ratification, by a person who pretended to have authority for that purpose is presumed to ratify it, unless immediately on being informed thereof he repudiates it."

authorized act: *Chamberlin v. Collinson*, 45 Iowa, 429; *Chamberlin v. Robertson*, 31 Iowa, 408. A release of a mortgage was made by an agent without authority. The principal afterwards accepted the consideration. The release was held binding on him: *Tooker v. Sloan*, 30 N. J. Eq. 394. An agent sold notes without authority, but the principal afterwards settled with him and took his note. *Held*, a ratification of his act: *Turner v. Wilcox*, 54 Ga. 593; *Beall v. January*, 62 Mo. 434; *Cushman v. Loker*, 2 Mass. 106. A lease of land was made in an agent's name. It was occupied by the corporation for which he professed to act. *Held*, a ratification: *Clark v. Gordon*, 121 Mass. 330. Goods were purchased by the president of a gas company and used in the construction of the works. In an action for a mechanic's lien the company set up that the president had no authority to make the purchase. It was held that they had ratified the act by using the goods: *Brown v. La Crosse City Gas Co.*, 21 Wis. 51. A lease of lands was made by an unauthorized agent. The owner accepted the rent as it became due. *Held*, a ratification: *McDowell v. Simpson*, 3 Watts, 129; 27 Am. Dec. 338. W.'s agent in procuring M.'s note signed a receipt in the name of W. containing an undertaking that the note should be paid at maturity. He was not authorized to sign such a receipt, but W. used the note in his business, and M. had to pay it at maturity. *Held*, that W. was liable on the contract contained in the receipt: *Mundorff v. Wickersham*, 63 Pa. St. 37; 3 Am. Rep. 531. M. shipped cotton to his factor, with instructions not to sell it at less than a certain price. The factor sold it at less, and immediately informed M., who made no objection but drew the proceeds. *Held*, that M. had ratified the act of the factor, and could not sue him for the loss: *Meyer v. Morgan*, 51 Miss. 21; 24 Am. Rep. 617. C., as agent of N., executed an agreement, required to be in writing by the statute of frauds, and took back a counterpart signed by the other party. An acceptance of this counterpart by N. from C. without objection was held to be a ratification of C.'s acts, and N. was bound by the contract: *Shaw v. Nudd*, 8 Pick. 9. A, the agent of an insurance company to solicit risks, obtained for B a policy of insurance from said company, paying for it a cash premium, and executing and depositing a premium note in the name of B. The policy recited that B had paid a cash premium and given a deposit note of like amount; B received the policy without reading it, and had no knowledge of the execution of the note by the agent. *Held*, that the acceptance of the policy by B. was a ratification of the act of the agent in executing the note; and that the fact known to B, that the agent was the agent of the company to solicit risks, would not prevent his acting for B in executing the premium notes: *Monitor Ins. Co. v. Buffum*, 115 Mass. 343. A, in a foreign

port, sold property belonging to B without authority, and wrote to B what he had done, and that C, the bearer of the letter, would settle with him by paying him the amount of the sales. C, on arriving, wrote to B that he would pay when in receipt of expected funds. B replied that although the sale was unauthorized, yet he was not disposed to make difficulty on the subject, but expected immediate payment, and drew bills on C, which were, however, protested for non-payment. *Held*, that the sale was ratified, and that B could not maintain replevin against the purchaser for the goods: *Clement v. Jones*, 12 Mass. 60. An agreement in writing, not sealed, whereby P., A., and two others, "a building committee," in consideration that M. would construct a building for a medical college by a time specified and furnish materials therefor, agreed to pay him certain amounts according to the monthly estimates of an architect named, was signed by all the parties in person, except P., whose name in his absence, but by his authority, was signed by A., without adding anything to show that it was not affixed by P.'s own hand. P., on being told what had been done, said all was right, and afterwards did all he could to insure the completion of the building. After M. had commenced an action against the four members of the committee to recover for work done and materials furnished under this agreement, all the parties executed a second agreement, under seal, reciting that they had made the first, and that a third person had agreed to advance a sum of money, to be secured by mortgage on the building, for the purpose of insuring its completion, and stipulating that M. should do certain additional work on the building, and have it finished by a certain time; that the sum so advanced should be applied, first, to pay for work thereafter done by M. on the building, and the remainder, if any, to pay for work and materials already furnished; and that nothing contained in this agreement should release or discharge the defendants from any debt already incurred under the original agreement, or be in any respect a waiver of that agreement. *Held*, that P.'s conduct, subsequent to the affixing of his name by A. to the first agreement, was a ratification or adoption of A.'s act, and also rendered him liable as a party to the agreement, on the ground of an estoppel *in pais*: *Merrifield v. Parritt*, 11 Cush. 590. The cashier of a bank who paid a check to D., and four days afterwards discovered reason to believe that it was forged, caused it to be presented by a messenger, with a demand for indemnity, at D.'s office, where a clerk received it in D.'s absence, and filled out and gave in exchange for it a check of like amount, left signed in blank by D. When the messenger returned and delivered this check to the cashier, D. was present, conversed on the subject, took the check into his

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hands, said something about the other check, and expressed no dissent or objection to what was being done, supposing that his check was issued by his brother, who had authority to issue checks for him in his absence. Later in the same day D. denied his clerk's authority, tendered back the other check, stopped the payment of his own, and demanded its return, which was refused. In an action by the bank against him on this check, *held*, that the surrender of the other check was a sufficient consideration for the issue of the check in suit; that it was competent for the jury to find, on the evidence, that D., at the interview with the cashier, understood the transaction, and ratified the issue of his check, and that on such a finding it was incompetent for him to revoke the ratification, and immaterial whether he supposed that his check was issued by one person or another: *Charles River Bank v. Davis*, 100 Mass. 413. K. supplied glass for a meeting-house by the order of V., and charged it to "N., one of the committee for building the meeting-house," of whom there were three. V. paid for it by his private note, and took a receipted bill made out to himself, and rendered an account to the parish, charging the sum as paid by him, and exhibiting the receipt as a voucher, which account was allowed. The note not being paid, K. sued the parish for the glass. *Held*, that the jury might properly find that the parish had not ratified the act of V. in purchasing on their credit: *Kupfer v. Augusta Parish*, 12 Mass. 185. A minor son exchanged his father's horse for another against his father's express commands; the father, however, kept and used the horse some weeks, and met the defendant without saying anything in disapproval of the exchange. *Held*, that he had ratified it, and could not recover back the other horse: *Hall v. Harper*, 17 Ill. 82. An agent borrows money for his principal without authority, but the money goes to the use of the principal, who afterwards recognizes the loan by telling the agent that he would pay it. *Held*, that the principal is liable to the lender: *Shiras v. Morris*, 8 Cow. 60. After notice of all that the indorser, to whom notes had been intrusted by a bank for collection, did in the premises, the bank accepted part of the proceeds from him. *Held*, that it thereby ratified his acts and became bound by them: *Bridenbecker v. Lowell*, 32 Barb. 9. M. by mistake sold wheat belonging to O., together with other wheat belonging to P., and remitted the proceeds of both lots to P. as his property, and O., with knowledge of the facts, afterwards took part of the money from P., and P.'s agreement to pay the balance. *Held*, that O. thereby ratified the sale: *Pierce v. O'Keefe*, 11 Wis. 180. A person, assuming to act as agent for another, exchanged a horse belonging to the latter for another horse, and the owner refused to sanction the exchange, but before reclaiming his horse,

participated in the purchase of the horse received in exchange from the party who had thus obtained possession of him. *Held*, that it amounted to a ratification: *Hatch v. Taylor*, 10 N. H. 538. An unincorporated company made assessments for carrying into effect a contract made by an officer of the company on behalf of the company, and afterwards appointed an agent to negotiate an alteration of the contract with the other party. *Held*, that they thereby ratified the contract, and could not deny the officer's authority to bind the company by contract: *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Rep. 286. A partner, on being shown a note, executed in the partnership name by a clerk, corrects the date, saying it is all right and that he will have to pay it. *Held*, that he ratifies its execution and admits his liability: *Harper v. Devene*, 10 La. Ann. 724. A real estate agent rented certain premises for two years at a fixed annual rental, although he had no authority from his principal to rent them for more than one year. The tenant retained possession for the two years, and paid the rent agreed on, which was received by the landlord. *Held*, that the jury were at liberty to infer, under the circumstances, that the agent's contract had been ratified by his principal: *Reynolds v. Davison*, 34 Md. 662. A debtor gave his creditor to understand that the latter might have a third party's note in payment of the debt, but not as collateral. In the debtor's absence the creditor made an arrangement, in good faith, with the debtor's book-keeper, to take the note as collateral. *Held*, that the debtor would be bound by this arrangement, although the book-keeper was unauthorized to make it, unless the debtor, upon being fully informed of what the book-keeper had done, manifested to the creditor his dissatisfaction within a reasonable time: *Burlington etc. Co. v. Greene*, 22 Iowa, 508. A factor was authorized to sell goods at a limited price, and he afterwards sold them below that price, and sent an account to his principal of the sales and prices, and authorized him to draw for the balance of account; and the principal received the account and drew for the balance, and made no objection, in his letters or otherwise, to the conduct of the factor in the sales. *Held*, that his conduct amounted to a ratification of the factor's proceedings: *Richmond Mfg. Co. v. Starks*, 4 Mason, 296. An agent employed to buy goods, to be paid for at a future day, paid for them out of his own money, for the purpose of obtaining the discount allowed by the seller. The principal, with knowledge of these facts, directed the agent to clear the goods at the custom-house, which, in the ordinary course of business, would be done after payment of the price by the agent for his principal. *Held*, a ratification or an adoption of the previous payment of the price, and that the agent might sue the principal for the price as money paid to his use at his request:

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Hawley v. Sentance, 11 Week. Rep. 311; 7 L. T., N. S., 745 (C. P.). In plaintiff's absence, his clerk received of his debtor a draft, and accepted the same, to be applied, when paid, on the debtor's account, and after the draft fell due the plaintiff wrote the debtor respecting it, not repudiating the act of the clerk, and on subsequently seeing the debtor, offered to return the unpaid draft. *Held*, that these facts furnished evidence from which a jury might infer a ratification by plaintiff of the act of the clerk: *Jennison v. Parker*, 7 Mich. 355. The owner of a vessel, on being informed by a broker, at his place of residence, that he had procured such vessel to be chartered at certain rates in a distant city, did not disaffirm the contract, either to such broker, or the charterer. *Held*, that the jury might find a ratification: *Saveland v. Green*, 40 Wis. 431. A horse was left with a servant for safe-keeping. The servant exchanged the horse for a mare; and the master, knowing all the circumstances connected with the transaction, took the mare, and kept and used her for some time. *Held*, to amount to a ratification of the act of the servant: *Evans v. Buckner*, 1 Heisk. 291. An agent sold land without authority, but the principal made no objection for four years, during which time the purchasers had improved the land, and during three years of which the agent had resided in the same town with his principal, when he, at length, absconded without having paid his principal any of the purchase-money. *Held*, that there was a ratification of the sale: *Alexander v. Jones*, 64 Iowa, 207.

ILLUSTRATIONS CONTINUED.—CASES IN WHICH RATIFICATION WAS NOT IMPLIED.—A presented to the officers of a bank for payment bills of the bank from a genuine plate, but with one forged signature. They hesitated for some time whether to receive them, but before A left, returned them to him, being still in doubt whether they were counterfeit or not. *Held*, that there was no ratification of the forged signature, so as to make the bank liable: *Salem Bank v. Gloucester Bank*, 17 Mass. 1; 9 Am. Dec. 111. One without authority sold the plaintiff's horse to the defendant, receiving in payment a bank check, which he indorsed and gave the plaintiff in payment of a debt he owed him. The plaintiff, in ignorance of the sale, collected the check, and applied the proceeds to the payment of that debt. In an action to recover the value of the horse, *held*, that the plaintiff's receipt and collection of the check were not a ratification of the sale, and that he had a right to appropriate the check to the extinguishment of the debt, in payment of which it was given him: *Thacher v. Pray*, 113 Mass. 291; 18 Am. Rep. 480. B. subscribed for stock in the testator's name during the life of the latter, but without his authority. *Held*, that the testator's declaration that he had stock of the kind and amount

subscribed for did not amount to a ratification of B.'s act: *Rutland R. R. Co. v. Lincoln*, 29 Vt. 206. A surveyor of highways in repairing a road exceeded the authority legally conferred upon him by the town, and the town, without knowledge of the excess of authority, accepted an order drawn upon them for the whole amount of the work. *Held*, that this did not constitute a ratification of the unauthorized acts of the surveyor: *Morrell v. Dixfield*, 30 Me. 157. A makes an unauthorized sale of B's goods. *Held*, that the receipt of money by B from A on account of such goods will not be a ratification of the sale, provided B would have the right without ratifying the sale to receive the money: *White v. Sanders*, 32 Me. 188. An agent was sent by A with a note in her favor against B, with authority only to receive a sum of money thereon, and return the note. He received the money, and made an arrangement with B, in pursuance of which he gave up the note and received certain other papers, and carried the money and papers to A, who "took the money and was displeased with the papers, saying she was cheated out of her money." *Held*, that this was not a ratification of the acts of the agent: *Crooker v. Appleton*, 25 Me. 131. The holder of a note to which A's brother had forged A's name asked A whether he had authorized the signature. A answered evasively, intimating, however, that he had not, but assuring the holder that the note would be paid. *Held*, not a ratification: *Smith v. Tramel*, 68 Iowa, 488.

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CHAPTER VII.

DETERMINATION OR DISSOLUTION OF AUTHORITY.

- § 42. Modes of dissolving agency.
- § 43. Performance of object — Lapse of time.
- § 44. Revocation by act of principal.
- § 45. Revocation by act of agent.
- § 46. Revocation by death of principal.
- § 47. Revocation by death of agent.
- § 48. Revocation by bankruptcy of principal.
- § 49. Revocation by bankruptcy of agent.
- § 50. Revocation by marriage of principal.
- § 51. Revocation by insanity of principal.
- § 52. Revocation by insanity of agent.
- § 53. Revocation by destruction of subject-matter.
- § 54. Revocation by war.
- § 55. When revocation takes effect.

§ 42. Modes of Dissolving Agency.—The agency may be terminated in three ways: 1. By agreement of the parties; 2. By the act of one party; 3. By operation of law. The dissolution by agreement may be (*a*) by performance of the object of the agency, or by (*b*) efflux of time. The dissolution by the act of a party may be (*c*) by revocation by the principal, or (*d*) by renunciation by the agent. The dissolution by operation of law may be (*e*) by the death of the principal, (*f*) by the death of the agent, (*g*) by the bankruptcy of the principal, (*h*) by the bankruptcy of the agent, (*i*) by marriage, (*j*) by the insanity of the principal, (*k*) by the insanity of the agent, (*l*) by the destruction of the subject-matter of the agency. An agent of a partnership is not justified in continuing to perform his duties as such, after being notified of a change in the firm by the admission of new partners, without a renewed authority from the new firm.¹

¹ Callanan v. Van Vleck, 36 Barb. 324.

§ 43. **Performance of Object—Lapse of Time.**—Where by an express agreement the agency is limited to a definite object or for a definite time, the performance of the object or the expiration of the time dissolves the agency in due course.¹ A power of attorney from a bank will not be invalidated by the expiration of the term of office of the directors who executed it.² Where an agent is employed to secure a debt of his principal, which he does by obtaining from the debtor notes payable to said debtor, and with his indorsement on them, his agency does not cease while he still holds the notes, and his acts have not been approved by his principal.³ The parting by a principal with his right in the subject-matter of the agency, before the attorney in fact has exercised the power, is, in law, a revocation of the power conferred.⁴ A land-owner may employ several different agents to act for him in the sale of the same tract, and a sale by one will operate as a revocation of the authority of the others.⁵ A power conferred upon an agent to negotiate bonds of the principal, if silent as to a like power previously given, does not operate as a revocation of the earlier power. Two persons may be employed separately to negotiate the sale or hypothecation of bonds, and either may thus dispose of them. If a disposition be made by one, of course the other will be unable to exercise the power with which he was clothed; but until a sale or hypothecation is made, either may make it.⁶

¹ *Blackburn v. Scholes*, 2 Camp. 343; *Moore v. Stone*, 40 Iowa, 259; *Walker v. Derby*, 5 Biss. 134; *Burton v. Great Northern R. R. Co.*, 9 Ex. 507; *Aspdin v. Aspdin*, 5 Q. B. 671; *Reid v. Latham*, 40 Conn. 454; *Schlater v. Winpenny*, 75 Pa. St. 321; *Moore v. Stone*, 40 Iowa, 259; *Bradford v. Bush*, 10 Ala. 386; *Smith v. Rice*, 1 Bail. 648; *Foster v. Calhoun*, Dud. (S. C.) 75. "Lapse of time at most only furnishes presumptive evidence of a revocation by the agent of his power by renunciation; but this, like all other modes of revocation, except that of the

death of the principal, applies to mere naked powers over which the principal has absolute control, and not to powers coupled with an interest, or such as are made upon sufficient consideration or for the mutual benefit of the parties": *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245.

² *Northampton Bank v. Pepoon*, 11 Mass. 288.

³ *Wallace v. Goold*, 91 Ill. 15.

⁴ *Gilbert v. Holmes*, 64 Ill. 548.

⁵ *Ahern v. Baker*, 34 Minn. 98.

⁶ *Hatch v. Coddington*, 95 U. S. 48.

ILLUSTRATIONS.—A appointed B his agent to sell machines for him, the agreement providing that A would furnish B such number of machines as A might be able to sell as his agent prior to October 1, 1867. *Held*, that the agency continued only to October 1st: *Gundlach v. Ficher*, 59 Ill. 172. The agent of the owner of a play to effect a sale thereof, *held*, to have no power to sell after a sale of the play to a person by his subagent: *Wallack v. Daly*, 1 N. Y. Week. Dig. 198. A power of attorney was executed to A by B's widow and heirs, empowering A to complete a contract made by B. *Held*, that it was not revoked by a grant of administration to her two days afterwards: *Jones v. Commercial Bank*, 78 Ky. 413. S. employed M. to sell a tract of land, agreeing, if M. would find a purchaser at a fixed price, to pay him five hundred dollars, which M. did. *Held*, that as soon as the agent procured the purchaser his agency ceased, and his taking a retainer from the purchaser to see that the papers were properly prepared and executed presented no ground for defeating a recovery of the price agreed to be paid to him: *Short v. Millard*, 68 Ill. 292. An interlocutory decree against an insurance company appointing a receiver with power to continue the business of the company in the receipt of premiums and the payment of the necessary expenses of the business, and enjoining the company, its officers and agents from receiving and disposing of the property of the company, except to deliver it to the receiver, *held*, not to revoke or annul the authority of an agent of the company to receive payment of a premium on a policy issued by the company; and a person who pays a premium to such agent after the issuing of the decree, but before either of them knew of it, cannot maintain an action against him to recover it back upon a declaration alleging that, at the time of such payment, the defendant had no authority to receive it: *Rice v. Barnard*, 127 Mass. 241.

§ 44. Revocation by Act of Principal.—In general, the principal may at any time before its performance revoke the authority of his agent at his pleasure.¹ A power of attorney which does not specify the time at which the

¹ *Peacock v. Cummings*, 46 Pa. St. 434; *Coffin v. Landis*, 46 Pa. St. 426; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Wells v. Hatch*, 43 N. H. 247; *Trust v. Repoor*, 15 How. Pr. 570; *Pickler v. State*, 18 Ind. 266; *Gibbons v. Gibbons*, 4 Harr. 105; *Jacobs v. Warfield*, 23 La. Ann. 395; *Brookshire v. Vancannon*, 6 Ired. 231; *Brown v. Pforr*, 38 Cal. 550; *Lewis v. Sawyer*, 44 Me. 332; *Simonton v. Minneapolis Bank*, 24 Minn. 216; *Gates v. Davenport*, 29 Barb. 190; *Evans v. Fearne*, 16 Ala. 689; 50 Am. Dec. 197; *Phillips v. Howell*, 60 Ga. 411; *Walker v. Dennison*, 86 Ill. 142.

agency is to terminate leaves it discretionary with the principal to discharge the agent at pleasure. The agent cannot, therefore, maintain an action against his principal in damages for a breach of contract in having discharged him at any particular time, if good cause is shown.¹ A contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when, in his judgment, the agent fails to meet that requirement of the contract.² An agent's authority to collect money for his principal is not revoked by the mere appointment of another agent with like authority, and a payment by the debtor to the first agent, after receiving notice of the appointment of the second, will discharge the debt, if there is no other evidence of a revocation of the first agent's authority.³ The demand of a note sent to a bank, as agent, for collection, terminates the agency, and a refusal to return it will be evidence of a conversion.⁴ On delivery of money by a debtor to a third person, to be paid to his creditor, such person becomes the agent of the debtor, who may revoke his direction at any time before the creditor assents to it. Any disposition by the debtor inconsistent with the appropriation first intended, such as an assignment for the benefit of creditors, will be a revocation. The creditor's assent to the deposit with the agent may be presumed from his knowledge, but his knowledge will not be presumed.⁵ A transfer of the authority of one court to another by statute will not revoke an authority given by the first court to a committee to make a highway.⁶ After revocation of an agent's authority, the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority.⁷

¹ *Jacobs v. Warfield*, 23 La. Ann. 395.

² *Tyler v. Ames*, 6 Lans. 280.

³ *Davol v. Quimby*, 11 Allen, 208.

⁴ *Potter v. Merchants' Bank*, 28 N. Y. 641; 86 Am. Dec. 273.

⁵ *Simonton v. Minneapolis Bank*, 24 Minn. 216.

⁶ *Brown v. Somerset*, 11 Mass. 221.

⁷ *Kelly v. Phelps*, 57 Wis. 425.

But the authority is not revocable when the authority is coupled with an interest.¹ For instance, "a factor for sale has an authority as such, in the absence of all special orders, to sell; and when he afterwards comes under advances he thereby acquires an interest, and having thus an authority and an interest, the authority becomes thereby irrevocable. . . . Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable."² Or if the power has been given for a valuable consideration,³ the consideration failing, the power becomes revocable.⁴ And the consideration or interest must be something beyond the mere compensation out of the proceeds or for the services to be rendered.⁵

A power of attorney to collect a debt, to secure previous advances by the agent, is irrevocable, but, so far as the agent is concerned, only to the amount of those advances.⁶ A power of attorney to confess a judgment is not revoca-

¹ *Hartley's Appeal*, 53 Pa. St. 212; 82 Am. Dec. 758; *Smyth v. Craig*, 3 Watts & S. 14; *Walker v. Dennison*, 86 Ill. 142; *Bonney v. Smith*, 17 Ill. 531; *Gilbert v. Holmes*, 61 Ill. 549; *Mansfield v. Mansfield*, 6 Conn. 559; 16 Am. Dec. 76; *Goodman v. Bowden*, 51 Me. 424; *Hutchins v. Hebbard*, 34 N. Y. 24; *Hunt v. Rousmanier*, 8 Wheat. 174 (see *Tharp v. Brenneiman*, 41 Iowa, 251, as to what is not such an interest); *Knapp v. Alvord*, 10 Paige, 235; 40 Am. Dec. 241; *Boecher v. Bennett*, 11 Barb. 380. That the parties are partners does not raise the inference of an interest within the above rule: *Travers v. Crane*, 15 Cal. 12; *Creager v. Link*, 7 Md. 267.

² *Wilde, C. J.*, in *Smart v. Sanders*, 5 Com. B. 895. A power of attorney to collect and distribute money is not revocable after its part execution of the collection of the money: *Watson*

v. Bagaley, 12 Pa. St. 164; 51 Am. Dec. 595. As to revocation of assignment for benefit of creditors, see *Oakley v. Hebbard*, 1 Pinn. 674; 44 Am. Dec. 425, and note 427; *Scull v. Reeves*, 3 N. J. Eq. 8; 29 Am. Dec. 703. A power to confess judgment given by defendant to plaintiff's attorney is not revocable: *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 215. ³ *Hunt v. Rousmanier*, 8 Wheat. 174.

⁴ *Ex parte Smither*, 1 Dea. 413.

⁵ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Walker v. Dennison*, 86 Ill. 142; *Barr v. Schroeder*, 32 Cal. 609; *Hartley's Appeal*, 53 Pa. St. 312; 82 Am. Dec. 758; *Darrow v. St. George*, 8 Co. 1 592; *State v. Walker*, 88 Mo. 27. *contra*, *Merry v. Lynch*, 68 Me. 94.

⁶ *Marzion v. Pioche*, 8 Cal. 522; *United States v. Jarvis*, Dav. 274; *Spear v. Gardner*, 16 La. Ann. 383.

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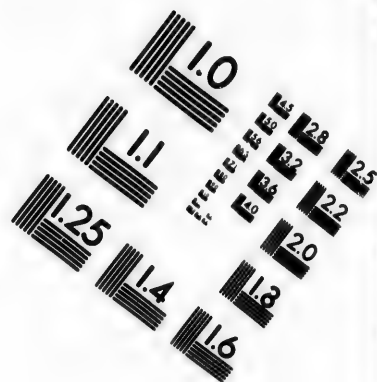
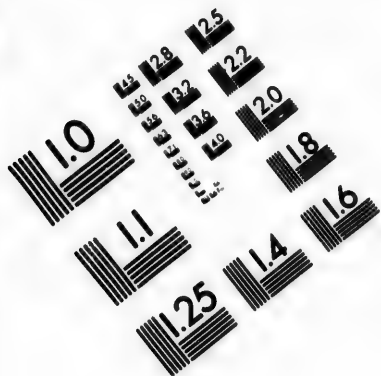
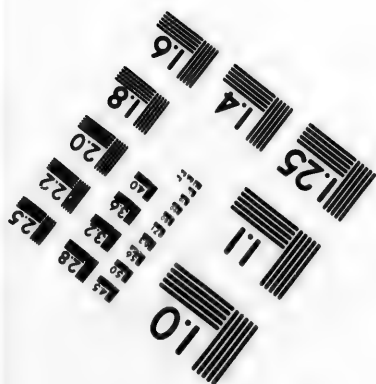
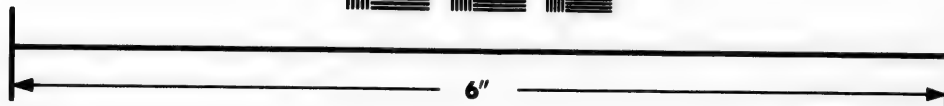
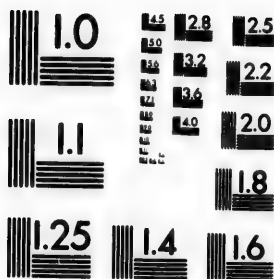


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ble by the act of the party giving it.¹ Equity will restrain the revocation of a power of attorney, coupled with an interest, upon unequivocal proofs, and enable the attorney to execute the trusts.² A power to sell and receive the proceeds above a certain sum by way of commission is not a power coupled with an interest which cannot be revoked.³ And even if the appointment states that it is irrevocable, this does not prevent its revocation by the principal, unless it is founded on a consideration, or the agent has an interest in its execution.⁴ And though the agent is appointed under seal, his authority may be revoked by parol.⁵ And even without a formal declaration, the revocation of the authority of the agent may be implied from circumstances;⁶ as for example, appointing another person to do the same act.⁷ But giving an additional power to one of two agents does not revoke the authority of the other.⁸

ILLUSTRATIONS. — A gives B an order, but countermands it before it is acted on. *Held*, that he is not responsible for what B does under it: *Tucker v. Lawrence*, 56 Vt. 467. The owner of land containing iron ore authorized an agent in writing to sell the land, the agent agreeing to transport specimens of the ore to England, and to receive as compensation "an undivided one fourth in the proceeds of sale, when sold as aforesaid." *Held*, that the agent's authority was not coupled with an interest,

¹ *Kindig v. March*, 15 Ind. 248.

² *Posten v. Rasette*, 5 Cal. 467; *Hynson v. Noland*, 14 Ark. 710; *Barr v. Schroeder*, 32 Cal. 609; *Bonney v. Smith*, 17 Ill. 531; *Hutchins v. Hebbard*, 34 N. Y. 24; *Brookshire v. Vonnannon*, 6 Ired. 231; *Wheeler v. Knaggs*, 8 Ohio, 169; *Hartley's Appeal*, 53 Pa. St. 212; 82 Am. Dec. 753; *Blackstone v. Buttermore*, 53 Pa. St. 266.

³ *Simpson v. Carson*, 11 Or. 361.

⁴ *Knapp v. Alvord*, 10 Paige, 205; 40 Am. Dec. 241; *Marfield v. Douglas*, 1 Sand. 360; *McGregor v. Gardner*, 14 Iowa, 326; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Walker v. Denison*, 86 Ill. 142.

⁵ *Brookshire v. Brookshire*, 8 Ired.

74; 47 Am. Dec. 341; *Pickler v. State*, 18 Ind. 266.

⁶ *Wallace v. Gould*, 91 Ill. 15; *Reid v. Latham*, 40 Conn. 452; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 108.

⁷ *Morgan v. Stell*, 5 Binn. 305; *Copeland v. Ins. Co.*, 6 Pick. 198; *contra*, *Davol v. Quimby*, 11 Allen, 208.

⁸ *Cushman v. Glover*, 11 Ill. 600; 52 Am. Dec. 461. A person sends to a bank a note for collection. He afterwards demands it back. This is a revocation: *Potter v. Merchants' Bk.*, 28 N. Y. 641; 86 Am. Dec. 273. An agent is employed to sell some property. He afterwards sells it himself. This is a revocation: *Torre v. Thiele*, 25 La. Ann. 418.

and was revocable at any time before sale: *Chambers v. Seay*, 73 Ala. 372. A person who had promised an agent a certain sum, if he found a purchaser for his land within a month, revoked the agent's authority. Before the expiration of the month, but after the revocation, the agent found a purchaser. *Held*, that he could not recover the sum promised: *Brown v. Pfoor*, 38 Cal. 550. B. delivered his note, with S. as security, to his creditor, who had demanded payment, to get it discounted and pay himself from the proceeds; the creditor took the note, and said he would get it discounted if he could, but refused to promise not to sue. *Held*, that the creditor took a power coupled with an interest which could not be revoked: *Wheeler v. Slocumb*, 16 Pick. 52. One's appointment as general agent of a life insurance company, *held*, to import a revocation of his special agency thereof: *Rapier v. La. Equit. Life Ins. Co.*, 57 Ala. 101. Money is paid by A into the hands of B to remain at the disposal of C. *Held*, that the right to that money continues in A until B gives and C takes credit for it, or B actually pays it to C; up to this period B is the agent of A only, and A may countermand the authority to make payment: *Howard College v. Pace*, 15 Ga. 486. A power to sell a vessel is given to P. Afterwards the principal gives a letter to P. and A., committing the vessel and cargo to their care, and adding, "we wish the vessel to be sold if it can be done at such price as you think reasonable." *Held*, that P. cannot sell without A.'s concurrence: *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. A person puts his property in the hands of two or more brokers to sell. He notifies one of them of his change of purpose, and proceeds to improve his property in a manner inconsistent with a desire to sell. *Held*, not a revocation of authority as to the others: *Lloyd v. Mathews*, 51 N. Y. 124. In a suit for specific performance, it appeared that A, as agent of B, sold land to C, and took his notes. Afterwards B appointed D his agent to sell the land; C thereupon agreed to give up his first contract, and buy of D for a larger sum, and afterwards C paid the original notes to A in whose hands they had remained. *Held*, that C had notice of the revocation of the first agency by the creation of the second, and that the payment to A, which never came to the vendor, did not entitle the vendee to maintain the suit: *Clark v. Mulenix*, 11 Ind. 532. A and B agreed, "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as A should continue to carry on business at the town of Liverpool, A should be the sole agent there for the sale of B's coals, and that B would not employ any other agent there for that purpose. There were stipulations in the agreement that B should have the entire control over the prices for which, and the credits at which, the coals were to be sold; and that, if

A could not sell a certain amount per year, or B could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years B sold the colliery itself. In an action by A for damages for breach of the agreement thereby occasioned, *held*, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to Liverpool: *Rhodes v. Forwood*, 1 L. R. App. Cas. 256; 24 Week. Rep. 1078; 34 L. T., N. S., 890 (H. L.); reversing 33 L. T., N. S., 314; 31 L. T., N. S., 61.

§ 45. By Act of Agent.—An agency may be dissolved by the renunciation of the agent.¹ But if the agency has been undertaken for a valuable consideration, the agent will be liable for such damages as the principal may suffer thereby;² and the same is true of a gratuitous undertaking which has been partly performed.³ An agent who is wanting in fidelity forfeits his right to his place, whatever may be the nature of his default, and whether it is or is not a source of injury to his principal.⁴ The change of the name of a firm does not operate to annul an agency conferred upon the same persons under another name.⁵

An agent had authority to sell and tried to sell a slave, but failed, and then attempted to run off, dispose of, and conceal the negro. *Held*, to be an absolute abandonment and renunciation of his agency: *Case v. Jennings*, 17 Tex. 661. An agent, under a contract as a book canvasser, wrote to his principal that he had determined to sell out and give up the business, and that if the principal wanted it, to come or send. *Held*, that the principal, after having made a fair attempt to settle, and having reason to suspect the agent's good faith, was justified in treating the agency as abandoned, and in appointing

¹ *Case v. Jennings*, 17 Tex. 661; *Barrows v. Cushway*, 37 Mich. 481; *Conroy v. Brandegee*, 2 La. Ann. 132; *Coffin v. Landis*, 5 Phila. 176. So the misconduct of the agent may dissolve the agency: *Henderson v. Hydraulic Works*, 9 Phila. 100; *Wharton on Agency*, sec. 108.

² *Gill v. Middleton*, 105 Mass. 479; 7 Am. Rep. 548; *White v. Smith*, 6

Lans. 5; *Benden v. Manning*, 2 N. H. 289; *Thorne v. Deas*, 4 Johns. 84; *Barrows v. Cushway*, 37 Mich. 481; that the agent must give the principal reasonable notice: *United States v. Jarvis, Davies*, 274.

³ *Evans on Agency*, 86.

⁴ *Henderson v. Hydraulic Works*, 9 Phila. 100.

⁵ *Billingsley v. Dawson*, 27 Iowa, 210.

another agent, and that a sale of the list of subscribers afterwards by the former agent, or an attempt on his part to release them, was invalid: *Stoddart v. Key*, 62 How. Pr. 137.

§ 46. **By Death of Principal.**—The death of the principal revokes the agent's authority¹ unless the power is coupled with an interest.² But a power even coupled with an interest, if expressly conditioned to be executed during the principal's life, ceases at his death.³ The authority of a subagent, where it emanates from the principal, is not affected by the death of the agent, from whom he received the appointment.⁴ An authority delegated to an attorney, from three trustees having a power coupled with an interest, and from the survivors and survivor of them, to sell and convey lands, is not revoked by the death of one of the trustees. Such delegation being joint and several, the attorney is invested with the full

¹ *Lincoln v. Emerson*, 108 Mass. 87; *Davis v. Windsor Savings Bank*, 46 Vt. 728; *Hunt v. Rousmanier*, 8 Wheat. 174; *Lewis v. Kerr*, 17 Iowa, 83; *Primm v. Stewart*, 7 Tex. 178; *Gale v. Tappan*, 12 N. H. 145; 37 Am. Dec. 195; *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Coney v. Saunders*, 28 Ga. 511; *Saltmarsh v. Smith*, 32 Ala. 407; *Salt v. Galloway*, 4 Pet. 335; *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 649; *Huston v. Cantrel*, 11 Leigh, 136; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *McDonald v. Black*, 20 Ohio, 185; 55 Am. Dec. 448; *Easton v. Ellis*, 1 Handy, 70; *Wilson v. Edmonds*, 24 N. H. 517; *Boone v. Clark*, 3 Cranch C. C. 389; *Bank of Washington v. Pierson*, 2 Wash. C. C. 685; *Scruggs v. Drover*, 31 Ala. 274; *McGriff v. Porter*, 5 Fla. 373; *Smith v. Smith*, 1 Jones, 135; 69 Am. Dec. 581; *Clayton v. Merritt*, 52 Miss. 353. The rule is the same where the death is not certainly known, but is presumed from long absence: *Primm v. Stewart*, 7 Tex. 178.

² *Merry v. Lynch*, 68 Me. 94; *Bonny v. Smith*, 17 Ill. 531; *Knapp v.*

Alvord, 10 Paige, 205; 40 Am. Dec. 241; *Gilbert v. Holmes*, 64 Ill. 548; *Hunt v. Rousmanier*, 8 Wheat. 171; *Hockett v. Jones*, 70 Ind. 227; *Leavitt v. Fisher*, 4 Duer, 1; *Houghtaling v. Marvin*, 7 Barb. 412; *Wilson v. Stewart*, 5 Pa. L. J. 450; *Bergin v. Bennett*, 1 Caines Cas. 1; 2 Am. Dec. 281; *Yates v. Frow*, 11 Ark. 58; *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274.

³ *Staples v. Bradbury*, 8 Greenl. 181; 23 Am. Dec. 494. The rule that the death of an agent acting under a letter of attorney, containing a power of substitution, acts as a revocation of the authority of an agent substituted by him under the power, — applied in case of the death of one empowered to buy and sell stocks who had substituted his son to act for him: *Lehigh Coal etc. Co. v. Mohr*, 83 Pa. St. 228; 24 Am. Rep. 161.

⁴ *Smith v. White*, 5 Dana, 376. In *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212, the representatives of a deceased principal were held entitled to recover of an agent purchase-money received by him on an authorized sale made by him, but after the principal's death unknown to him.

powers of the surviving trustees, so as to pass both the beneficial and the legal estates.¹ The rule that the acts of an agent, after the death of his principal, are void, only applies to acts which must be done in the name of the principal, and not to those which the agent may do in his own name. Thus the executor of A cannot recover from B money received by the latter, in discharge of notes given by C, the agent of A to secure advances made by B to C, as such agent, A's death having taken place unknown to both parties, before the advances were made.² And where, by indorsement for collection, authority is given to an agent to sue in his own name on negotiable paper, the legal title in trust is transferred, and the authority to collect is not revoked by the death of the principal and owner.³ So the dissolution of a partnership revokes an agency,⁴ but not a mere change in the firm name.⁵

ILLUSTRATIONS. — Defendant was given certain notes to collect, which did not mature till after the giver's death. *Held*, that his authority terminated with the death, and that he was not liable for failure to collect, though during the delay the makers became insolvent: *Darr v. Darr*, 59 Iowa, 81. The power of an agent, under an agreement to sell a lot of bricks, pay a certain lien for making, etc., and certain notes he held against the principal, and return him the overplus of the proceeds, *held*, not to be extinguished by the death of the principal, and to entitle the agent to pay his own notes in full, although other creditors of the estate received only a percentage: *Merry v. Lynch*, 68 Me. 94. A retainer under a contract to endeavor to sell goods on behalf of the owner, on the terms of receiving a stipulated sum in the event of the sale, but nothing in the case of failure, *held*, revocable by the employer before sale, even after endeavors have been made, and is revoked in law by his death after such endeavors; so that even if his personal representative confirms the sale under such contract, he will not (unless he knows of and confirms the terms of the contract), be liable to pay the stipulated sum: *Campanari v. Woodburn*, 15 Com. B. 400.

¹ *Wilson v. Stewart*, 5 Pa. L. J. 450.

⁴ *Schlater v. Winpenny*, 75 Pa. St.

² *Dick v. Page*, 17 Mo. 234; 57 Am. 321.

Dec. 267.

³ *Moore v. Hall*, 48 Mich. 143.

⁵ *Billingsley v. Dawson*, 27 Iowa, 210.

R. B., having been stabbed by L., requested his brother E. B. to employ counsel and prosecute L. for the offense, and told him that, whether he lived or died, he should be paid. R. B. died; and after his death E. B. employed counsel and prosecuted L., and paid therefor \$175, to recover which sum he brought his action against R. B.'s administrator. *Held*, that R. B. dying before E. B. had acted on his request, the request was revoked by his death: *Jones v. Beall*, 19 Ga. 171. A delivered a note to B and C, attorneys, for collection, taking their receipt therefor. After B's death, the note was collected by C, the surviving partner. Suit against C and the administrator of B to recover the money collected. *Held*, that the relation between the parties, which was that of principal and agent, was terminated on the death of B, and his estate cannot be charged for the subsequent misconduct of C: *Johnson v. Wilcox*, 25 Ind. 182. A, wishing to go abroad for his health, gives B control of his property, with a power of attorney authorizing him to take the entire management of the business, and if necessary sell the property to pay certain notes indorsed by B. *Held*, that the power of sale being coupled with B's interest as indorser may be exercised after A's death: *Knapp v. Alvord*, 10 Paige, 205; 40 Am. Dec. 241.

§ 47. **By Death of Agent.**—And the death of the agent terminates the agency,¹ but does not affect the authority of a subagent.² But the death of an agent acting under a power of attorney giving a right of substitution revokes the authority of a subagent appointed under such power.³ And where the agent is a partnership, the death of one partner terminates the agency;⁴ the rule being that where a power is given to two the death of one revokes it.⁵ Where a commission vests power in two without words of survivorship, and one of them dies, unless there is a subsequent recognition by the principal of the survivor as agent his acts will not bind the principal.⁶

¹ *Merrick's Estate*, 8 Watts & S. 402; *Page v. Allison*, 1 Brev. 495; 2 Am. Dec. 632; *City Council v. Duncan*, 3 Brev. 386; *Jackson Ins. Co. v. Partee*, 9 Heisk. 296; *Judson v. Love*, 35 Cal. 463.

² *Smith v. White*, 5 Dana, 376.

³ *Lehigh Coal Co. v. Mohr*, 83 Pa. St. 228; 24 Am. Rep. 161; *Peries v. Ayci-*

nena, 3 Watts & S. 79; *Watt v. Watt*, 2 Barb. Ch. 371.

⁴ *Martine v. International Fire Ins. Co.*, 53 N. Y. 337; 13 Am. Rep. 529.

⁵ *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180.

⁶ *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180.

ILLUSTRATIONS.—One member of a firm, who were agents of an insurance company, died. *Held*, that the agency was thereby terminated, and that receipts subsequently given to the insured, signed by the survivor as survivor, were notice to him of the termination, so that subsequent payments on such receipts were not made to the company's agent: *Martine v. International Life Assur. Soc.*, 62 Barb. 181; 53 N. Y. 339; 13 Am. Rep. 539. By a contract between a planter and a factor or commission merchant, the latter binds himself to furnish supplies for the working of the plantation and to receive and sell the products of the place for the benefit of the planter. *Held*, a contract of agency; and terminated by the death of the agent: *Shiff v. Lesseps*, 22 La. Ann. 185.

§ 48. By Bankruptcy of Principal.—The authority of the agent ceases on the bankruptcy of the principal; he has no authority after that to receive or pay the principal's money.¹ It is otherwise, however, as to property or rights which do not pass from the bankrupt by the bankruptcy, but continue to remain in him;² and also where the power is coupled with an interest.³

§ 49. By Bankruptcy of Agent.—And likewise the bankruptcy of the agent dissolves the agency,⁴ except as to the execution of formal acts which pass no interest.⁵

§ 50. By Marriage of Principal.—The marriage of the principal revokes the agency;⁶ but the marriage of the agent does not.⁷ Where a woman retains the right to administer her paraphernal property without her husband's assistance, her marriage will not revoke the pow-

¹ Evans on Agency, 89; In re Daniels, 13 Nat. Bank. Reg. 40; Parker v. Smith, 16 East, 382; Ogden v. Gillingham, Bald. 33.

² Story on Agency, sec. 482; Wharton on Agency, sec. 98.

³ Story on Agency, sec. 483.

⁴ Audenried v. Betteley, 8 Allen, 302; Hudson v. Granger, 5 Barn. & Ald. 27.

⁵ Story on Agency, sec. 480; Evans on Agency, 92.

⁶ Henderson v. Ford, 46 Tex. 628. This was the case of a power of attor-

ney by a single man to sell his home. It was held revoked by his marriage: *McCan v. O'Ferrall*, 8 Clark & F. 30; *Charnley v. Winstanley*, 5 East, 266; *Wamhale v. Foote*, 2 Dak. 1. These were cases of authorities given by *femes sole*. But where the power is coupled with an interest, the marriage of the principal (*feme sole*) does not revoke it: *Eneu v. Clark*, 2 Pa. St. 234; 44 Am. Dec. 191.

⁷ Story on Agency, sec. 485; Wharton on Agency, sec. 109.

ers of an agent previously intrusted with its administration.¹

§ 51. **By Insanity of Principal.**—The insanity of the principal, preventing him from making a valid contract, will operate as a revocation of the agency.² It must clearly appear, however, that the insanity was of this kind before an agency will be judicially declared revoked for this cause. And as to persons who have dealt with the agent in ignorance of the principal's insanity, the transactions will be upheld.³ Also where the power is coupled with an interest it will not be revoked by the principal's insanity.⁴

§ 52. **By Insanity of Agent.**—The insanity of the agent must revoke the authority, as it cannot be presumed that the principal intended to be represented by one unable even to contract for himself.⁵

§ 53. **By Destruction of Subject-matter.**—The authority of the agent is determined whenever the subject-matter of the agency or the principal's power over it is at an end.⁶ A guardian, for example, may appoint an agent to act for his ward; but on the coming of age of the ward the authority would be revoked.⁷ And thus, "if the agent is commissioned to sell a ship which is subsequently destroyed by fire, or a race-horse which dies, in all these cases his authority is at an end."⁸ An assignment of a judgment is a revocation of the authority of the plaintiff's attorney to control it.⁹

¹ Reynolds v. Rowley, 2 La. Ann. 890.

² Motley v. Head, 43 Vt. 633; Willis v. Manhattan Co., 2 Hall, 495; Davis v. Lane, 40 N. H. 156; Matthiessen v. McMahon, 38 N. J. L. 537; Hill v. Day, 34 N. J. Eq. 150.

³ Davis v. Lane, 10 N. H. 156; Drew v. Nunn, L. R. 42 Q. B. D. 661.

⁴ Matthiessen v. McMahon, 38 N. J. L. 536.

⁵ Story on Agency, sec. 487; Evans on Agency, 100.

⁶ Gilbert v. Holmes, 64 Ill. 548; Walker v. Dennison, 86 Ill. 142; Bissell v. Terry, 69 Ill. 184. The inability of a corporation to continue in business is no excuse for its breach of a contract with an agent to serve it for a specified time: Lewis v. Atlas Ins. Co., 61 Mo. 534.

⁷ Wharton on Agency, sec. 100.

⁸ Evans on Agency, 100.

⁹ Trumbull v. Nicholson, 27 Ill. 149.

ILLUSTRATIONS.—The inhabitants of a town authorized the treasurer to borrow money to pay a certain tax. The tax was subsequently reported without the loan. The authority of the agent to borrow ceased thereon: *Benoit v. Conway*, 10 Allen, 528. A person employs several agents to sell his land. One of them sells the land. This is a revocation of the authority of the others: *Ahern v. Baker*, 34 Minn. 98. One was appointed, under a statute, an agent of the state to collect certain claims against the United States, and was to be compensated out of the amount collected. *Held*, that his appointment was revoked by a repeal of the statute: *State v. Walker*, 88 Mo. 279.

§ 54. **By War.**—War between the country of the principal and that of the agent terminates the agency, according to some cases; while according to others, it does not.¹ But the captivity of a prisoner of war cannot affect a power given, when he was free, to an agent.²

ILLUSTRATIONS.—A citizen of Mississippi, shortly before the fall of New Orleans, committed to an agent there to sell certain bills of exchange, which, six days after the fall, he sold for moderate money. *Held*, that the agent's authority was not revoked by the surrender of the city: *Murrell v. Jones*, 40 Miss. 565. The owner of a farm in Mississippi removed to Texas during the late war, and left an agent to supervise and carry on his farm. *Held*, that such agency was not terminated by the federal occupancy of the territory in which the farm was situated, and that a contract entered into between such agent and the federal authorities to carry on the farm, and work freedmen thereon, did not terminate the agency, or give the agent any power to defeat the interest of his principal by claiming the proceeds of the farm; but what he did on the farm he did as agent, and the products of the farm belonged to the principal: *Shelby v. Offutt*, 51 Miss. 128.

§ 55. **When Revocation Takes Effect.**—The revocation by the act of the principal takes effect as to the

¹ *Blackwell v. Willard*, 65 N. C. 555; 6 Am. Rep. 749; *Howell v. Gordon*, 40 Ga. 302; *Conley v. Burson*, 1 Heisk. 145; *Ins. Co. v. Davis*, 95 U. S. 425; *contra*, *Maloney v. Stephens*, 11 Heisk. 738; *Jones v. Harris*, 10 Heisk. 98; *Darling v. Lewis*, 11 Heisk. 125; *Robinson v. International Ins. Co.*, 42 N. Y. 547; 1 Am. Rep. 490; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614; 3 Am. Dec. 218.

² *Pope v. Chafee*, 14 Rich. Eq. 69.

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agent from the moment he receives notification of it,¹ and as to third persons only from the time when it is made known to them.² Acts of an agent, done after the revocation of his agency, bind both his principal and himself, so far as they regard third persons who have had no notice of the revocation.³ Notice by the principal to third persons of the contents of a written agreement with the agent terminating the agency is sufficient notice of its termination.⁴ But where the agent is a special one having authority to do only a particular act, notice to third parties of the revocation is not necessary.⁵ Third persons have no just right to conclude that a new agency had been established after they have been notified by the principal that the former agency had ceased, from the fact that the agent was conducting business as formerly.⁶ As to the time when the revocation by the death of the principal takes effect, the rule, as established by the great weight of authority is, that the revocation is instantaneous, both as to the agent and third parties, on the death of the principal, even as to acts of the agent before he obtains knowledge of the decease.⁷ In a few states, however, the more rea-

¹ Story on Agency, sec. 470; Neile v. United States, 7 Ct. of Cl. 535; Jones v. Hodgkins, 61 Me. 480; Robertson v. Cloud, 47 Miss. 208.

² Rice v. Barnard, 127 Mass. 241; Meyer v. Hebner, 96 Ill. 400; Braeswell v. Ins. Co., 75 N. C. 8; Ulrich v. McCormick, 66 Ind. 243; Clafin v. Lenheim, 68 N. Y. 301; McNeilly v. Continental Ins. Co., 66 N. Y. 23; Robertson v. Cloud, 47 Miss. 208; Beard v. Kirk, 11 N. H. 397; Wright v. Herriek, 128 Mass. 240; Hatch v. Col'dington, 95 U. S. 48; Barkley v. R. Co., 71 N. Y. 205; Rice v. Isham, 4 Abb. App. 37; Morgan v. Still, 5 Bin. 305; Tier v. Lampson, 35 Vt. 179; 82 Am. Dec. 634; Diversy v. Kellogg, 44 Ill. 114; 92 Am. Dec. 154; Capen v. Pacific Mut. Ins. Co., 25 N. J. L. 67; 64 Am. Dec. 412; Van Dusen v.

Star etc. Mining Co., 36 Cal. 571; 95 Am. Dec. 209.

³ Lamothe v. St. Louis etc. R. R. Co., 17 Mo. 204; Hancock v. Byrne, 5 Dana, 514; Beard v. Kirk, 11 N. H. 398; Harris v. Cuddy, 21 La. Ann. 388.

⁴ Van Dusen v. Mining Co., 36 Cal. 571; 95 Am. Dec. 209.

⁵ Watts v. Kavanaugh, 35 Vt. 34.

⁶ Van Dusen v. Mining Co., 36 Cal. 571; 95 Am. Dec. 210.

⁷ Clayton v. Merritt, 52 Miss. 353; Riggs v. Caye, 2 Humph. 350; 37 Am. Dec. 559; Gale v. Tappan, 12 N. H. 145; 37 Am. Dec. 194; Harper v. Little, 2 Me. 14; 11 Am. Dec. 25; Snout v. Iberry, 10 Mees. & W. 1; Galt v. Gal-loway, 4 Pet. 332; Clark v. Courtney, 5 Pet. 319; Ferris v. Irving, 28 Cal. 645; Cleveland v. Williams, 29 Tex. 204; 94 Am. Dec. 274; Scruggs v. Diver, 31

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sonable rule is adopted that acts *bona fide* executed by the agent before notice of his death, and which do not require to be done in the principal's name, are valid in favor of innocent parties.¹

ILLUSTRATIONS. — A letter written by his principal revoking the agency is received by the agent on Wednesday. It was written on Monday. The dissolution of the agency dates from Wednesday, even though it was mailed on Monday: *Robertson v. Cloud*, 47 Mass. 208. An agent's authority has been withdrawn, but parties owing the principal pay their debts to the agent, not knowing of the revocation. The payments bind the principal: *Packer v. Locomotive Works*, 122 Mass. 484; *Insurance Co. v. McCain*, 96 U. S. 84. A had long been in business for himself, and his name was on his sign. He was old, and his sons carried on the business. A selling agent booked the sons' order as an order from A, and then altered it at the sons' request, they saying that if A left the firm before the goods were shipped they would give notice. They gave no notice. *Held*, that A was liable for the goods: *Foellinger v. Leh*, 110 Ind. 238. The defendants, a steamboat company, had employed A as steward on one of their boats, and A had, while so employed, purchased supplies for the boat of the plaintiffs and others, by authority of the defendants and on their credit. The defendants afterwards ceased to employ A as steward, and advertised for proposals for contracts to board their officers and crews at a fixed price per week, and to furnish the passengers' table, the contractors to furnish all the supplies at their own expense, and entered into such a contract with A for one of their boats, and into a similar contract with B for another boat. The defendants gave no notice to the plaintiffs of the change in the manner of virtualing their boat, and did not advertise such change, except by advertising for proposals as above. A and B afterwards, without the knowledge of the defendants, purchased supplies for their respective boats of the plaintiffs, who were ignorant of their contracts with the defendants, and the goods so purchased were, by the direc-

Ala. 274; *Gleason v. Dodd*, 4 Met. 333; *Nichols v. Chapman*, 9 Wend. 452; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 648; *Davis v. Windsor Bank*, 46 Vt. 728.

¹ *Cassidy v. McKenzie*, 4 Watts & S. 282; 39 Am. Dec. 76; *Wilson v. Stewart*, 5 Pa. L. J. 450; *Dick v. Page*, 17 Mo. 234; 57 Am. Dec. 267; *Cariger v. Wellington*, 26 Mo. 204; *Ish v. Crane*, 8 Ohio St. 520; and see *Bank of New*

York v. Vanderhorst, 32 N. Y. 553. See an able article sustaining this view, 6 Cent. L. J. 333. By statute in several states, payments made to an agent in ignorance of the principal's death are valid: R. C. Md. 1878, art. 44, sec. 31; La. R. C. (Voorhies), 1875, arts. 3032, 3033; Ga. R. S. 1875; see *Coney v. Saunders*, 28 Ga. 511; Cal. Civ. Code, sec. 2356.

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tion of A and B, charged to the defendants. *Held*, that under the rule that where a general authority has been conferred on an agent, its revocation takes effect as to third persons only after notice, and it is the duty of the principal to notify those persons who have had dealings with the agent; the defendants were liable for the goods purchased by A, but not for those purchased by B: *Fellows v. Hartford Steamboat Co.*, 38 Conn. 197. Two agents of different principals agreed to settle the indebtedness of each agent to his principal by a transfer of account, and by a payment by one agent to the other of the difference in cash. Before the agreement was executed, the agency of the one who was to pay was revoked. *Held*, that the arrangement thus came to an end, and could not be enforced by the principal: *Providence Gas Burner Co. v. Barney*, 14 R. I. 18.

2. THE AUTHORITY CONFERRED.

CHAPTER VIII.

THE NATURE AND EXTENT OF THE AUTHORITY.

- § 56. General and special agency.
- § 57. Authority may be implied.
- § 58. Authority is restricted to character in which it is given.
- § 59. Acts must be for principal's benefit.
- § 60. Construction of agent's authority in general.
- § 61. What acts are or are not within particular phrases — "Accountable" — "All matters" — "Attend to business" — "Borrow" — "Business and financial agent" — "Buy and sell" — "Canvass" — "Cost" — "Cite and appear" — "Claims and effects."
- § 62. Particular powers (continued) — "Collect" — "Deliver" — "Deposit" — "Draw, indorse, and accept bills" — "Execute" — "Give discharges" — "Hire" — "Indorse."
- § 63. Particular powers (continued) — "Invest" — "Lands" — "Lay out" — "Loan" — "Make deeds and sales" — "Manage" — "Mortgage" — "Obtain securities" — "Place" — "Procure a purchaser."
- § 64. Particular powers (continued) — "Purchase" — "Rent and care for" — "Receive checks" — "Release."
- § 65. Particular powers (continued) — "Sell" — "Sell and convey" — "Sell at retail."
- § 66. Particular powers (continued) — "Settle" — "Ship" — "Sign name" — "Solicit" — "Subscribe" — "Sue" — "Take care of" — "Transact."
- § 67. What powers implied under particular circumstances — Advertising — Admissions — Arbitrate — Assign — Auction — Board at hotel — Borrow — Cancel — Compromise — Collect — Confess judgment.
- § 68. What powers implied (continued) — Employing agents — Employing counsel — Exchange or barter — Deliver — Foreclose mortgage.
- § 69. What powers implied (continued) — Give credit — Guaranty — Hiring horses — Indorsing — Lease — Legacy — License — Loan.
- § 70. What powers implied (continued) — Making accommodation notes — Or deed — Negotiable paper — Mortgage — Pledge — Purchase.
- § 71. What powers implied (continued) — Receive payment.
- § 72. What powers implied (continued) — Renting store — Rescind contract.
- § 73. What powers implied (continued) — To sell — Settle — Suretyship — Tender — Transfer — Voluntary conveyance.
- § 74. What powers implied (continued) — Waiver — Warranty.
- § 75. Carrier's agents.
- § 76. Railroad servants.

§ 56. **General and Special Agency.** — Agents are either general agents or special agents. A special agency exists where the authority is to do a single act. A general agency exists where the authority is to do all acts in any particular trade or calling. Lord Ellenborough laid down this distinction in a case decided by him in 1812,¹ where he said that a general authority imports an authority which is derived from a multitude of instances, while a special or particular authority is confined to a particular instance, and this distinction is followed in a multitude of adjudications.² An agent may be both a general and special agent, — general, for example, as to the manner of buying and selling, and special as to the kind of property to be purchased.³ In cases of a special agency, limited to one transaction, the law raises no inference that the agency continues or extends to other matters occurring years after.⁴ An authority to an agent to buy a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency; while authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, not having in view a single trans-

¹ *Whitehead v. Tacket*, 15 East, 408.

² *Martin v. Farnsworth*, 49 N. Y. 555; *Beals v. Allen*, 18 Johns. 363; 9 Am. Dec. 221; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Reynolds v. Kenyon*, 43 Barb. 583; *Andrews v. Kneeland*, 6 Cow. 354; *Dart v. Hercules*, 57 Ill. 446; *Baxter v. Lamont*, 60 Ill. 234; *Fatman v. Leet*, 41 Ind. 133; *Cruzan v. Smith*, 41 Ind. 288; *Palmer v. Cheney*, 35 Iowa, 281; *Willard v. Buckingham*, 36 Conn. 395; *Ladd v. Town of Franklin*, 37 Conn. 53; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728; *Butler v. Maples*, 9 Wall. 766; *Golding v. Merchant*, 43 Ala. 705; *Atlantic etc. R. R. Co. v. Reisner*, 18 Kan. 458; *Loudon Savings Society v. Hagerstown Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Westfield Bank v. Cornein*, 37 N. Y. 320; 93 Am. Dec. 573. "A person who is

authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. But a person who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business, or employment, is a general agent in that trade, business, or employment": *Story on Agency*, sec. 17; *Anderson v. Coonley*, 21 Wend. 279; *Walker v. Skipwith*, Meigs, 502; 33 Am. Dec. 161; *Tomlinson v. Callet*, 3 Blackf. 436; *Loudon Savings Bank v. Hagerstown Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Cruzan v. Smith*, 41 Ind. 288; *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 358.

³ *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476.

⁴ *Reed v. Baggott*, 5 Ill. App. 257.

action, but a number of separate transactions, constitutes a general agency.¹ An authority to bid in certain property at sheriff's sale, for the principal, at a specified sum, is a special agency; and the party thus authorized, if he bid a larger sum in his own name, makes himself responsible as a purchaser, but not his principal.² For the acts of a general agent within the general scope of his authority the principal is bound, even though they may be in violation of his instructions;³ while, on the other hand, the principal is not bound by the unauthorized acts of a special agent,⁴ for persons dealing with a special agent are bound to ascertain the extent of his authority.⁵

¹ *Butler v. Maples*, 9 Wall. 766.

² *Matter of Driggs*, 4 Pa. L. J. 87.

³ *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 66; *Adams Express Co. v. Schlessinger*, 75 Pa. St. 246; *Furnas v. Frankman*, 6 Neb. 429; *Anderson v. State*, 22 Ohio St. 305; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Palmer v. Cheney*, 35 Iowa, 281; *Savage v. Rex*, 9 N. H. 263; *Farmers' Bank v. Butchers' B'k*, 16 N. Y. 148; *Cruzan v. Smith*, 41 Ind. 288; *Grafins v. Land Co.*, 3 Phila. 447; *Loudon etc. Co. v. Hagers-town Bank*, 36 Pa. St. 503; 78 Am. Dec. 390; *Daylight Burner Co. v. Odlin*, 51 N. H. 56; 12 Am. Rep. 45; *Merchants' Bank v. Griswold*, 72 N. Y. 472; 28 Am. Rep. 159; *Eilenberger v. Insurance Co.*, 89 Pa. St. 464; *City Bank v. Kent*, 57 Ga. 283; *Commercial Bank v. Cortright*, 22 Wend. 348; 34 Am. Dec. 317; *Malloy v. Barrett*, 1 E. D. Smith, 243; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Topham v. Roche*, 2 Hill, 307; 27 Am. Dec. 387; *Scott v. McGrath*, 7 Barb. 55; *Chase v. New York Cent. R. R. Co.*, 26 N. Y. 528; *Ayer v. Tilden*, 15 Gray, 182; 77 Am. Dec. 355; *McClure v. Richardson*, Rice, 215; 33 Am. Dec. 105; *Hackney v. Insurance Co.*, 4 Pa. St. 187; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Barber v. Hall*, 26 Vt. 112; 60 Am. Dec. 301; *Choteau v. Leech*, 18 Pa. St. 224; 57 Am. Dec. 602; *Kinealy v. Burd*, 9 Mo. 359; *Carmichael v.*

Buck, 10 Rich. 352; 70 Am. Dec. 226. See *City of St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586.

⁴ *Baxter v. Lamont*, 60 Ill. 237; *Blackwell v. Ketcham*, 53 Ind. 184; *National Iron Co. v. Bruner*, 19 N. J. Eq. 331; *Sharp v. Brandon*, 15 Wend. 598; *Clark v. Polk Co.*, 19 Iowa, 252; *Ladd v. Franklin*, 37 Conn. 62; *Ban-orgee v. Hovey*, 5 Mass. 11; 4 Am. Dec. 17; *Pursley v. Morrison*, 7 Ind. 356; 63 Am. Dec. 424; *Thomas v. Atkinson*, 38 Ind. 256; *Holcraft v. Holbert*, 16 Ind. 258; *Dozier v. Freeman*, 47 Miss. 647; *Craycraft v. Selva*, 10 Bush, 696; *Weise's Appeal*, 72 Pa. St. 351; *Berry v. Barnes*, 23 Ark. 414; *Whiteside v. United States*, 93 U. S. 147; *Lewis v. Commissioners*, 12 Kan. 286; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Floyd Acceptance Cases*, 7 Wall. 666; *Silliman v. Fredericksburg R. R. Co.*, 27 Gratt. 120; *Callender v. Golson*, 37 La. Ann. 311; *Munn v. Commission Co.*, 15 Johns. 44; 8 Am. Dec. 219; *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168; *Boals v. Allen*, 18 Johns. 363; 9 Am. Dec. 221; *Godloe v. Godley*, 13 Smedes & M. 233; 51 Am. Dec. 159; *McCoy v. McKowen*, 26 Miss. 487; 59 Am. Dec. 264; *Sprague v. Iram*, 34 Vt. 155.

⁵ *Id.*; *Lumpkin v. Wilson*, 5 Heisk. 555; *Thornton v. Bryden*, 31 Ill. 200; *Schenmelpenich v. Bayard*, 1 Pet. 264; *Thacher v. Kancher*, 2 Cal. 698; *Bell v. Offutt*, 10 Bush, 632; *Earp v. Rich-*

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But what is a special authority as between principal and agent may have all the effects of a general authority as to third persons, the rule being that while the principal is not bound by the act of a special agent beyond his authority,—third persons, in dealing with such an agent, being bound to ascertain the limits of his authority,—yet where he has held out the agent as having a larger authority than he really possesses, he will be estopped from setting up the actual terms of his authority.¹ Partners who have authorized their agent by written power of attorney to draw bills of exchange against them, and paid such bills when drawn, thus inducing the public to believe him their agent, cannot avoid payment of a bill drawn by him on the ground that it was unauthorized by them.² Although a private agent may bind his principal by acts in violation of his special instructions, if they are within the scope of a general authority, the rule is otherwise when applied to the acts of an officer of a public corporation, the reason being that in the former case the extent of the authority is necessarily known only to the principal and agent, while in the latter it is a matter of record in the books of the corporation or the public laws.³ Where the authority purports to be derived from a written instrument, or the contract is expressly made “as agent,” it devolves upon the other party to see that the agent has

ardson, 81 N. C. 5; Baxter v. Lamont, 60 Ill. 237; Reed v. Welsh, 5 Heisk. 555; Snow v. Perry, 9 Pick. 542; Lobdell v. Baker, 1 Met. 193; 35 Am. Dec. 358; New York Iron Mine v. Bank, 39 Mich. 644; Stewart v. Woodward, 50 Vt. 78; 23 Am. Rep. 488; Williams v. Birbeck, Hoff. Ch. 364; Harrison v. Fire Ins. Co., 9 Allen, 233; Brown v. Johnson, 12 Smedes & M. 398; 51 Am. Dec. 118; Baring v. Pierce, 5 Watts & S. 548; 40 Am. Dec. 534; Briggs v. Large, 30 Pa. St. 291; Reitz v. Martin, 12 Ind. 308; 74 Am. Dec. 215.

¹ Golding v. Merchant, 43 Ala. 705; Cooke v. Campbell, 13 Ala. 286; Kelly v. Fall Brook Coal Co., 4 Hun, 261; Cos-

grove v. Ogden, 49 N. Y. 255; 10 Am. Rep. 361; Morton v. Scull, 23 Ark. 289; Cruzan v. Smith, 41 Ind. 288; Nelson v. Cowing, 5 Hill, 336; Hunter v. Jameson, 6 Ired. 252; Gallup v. Ledner, 1 Hun, 282; Kerslake v. Schoonmaker, 1 Fun, 436; St. Louis etc. R. R. Co. v. Parker, 59 Ill. 39; Nixon v. Brown, 57 N. H. 34; Merchants' Bank v. Central Bank, 1 Ga. 418; 44 Am. Dec. 655; Towle v. Leavitt, 23 N. H. 360; 55 Am. Dec. 195; Lister v. Allen, 31 Md. 543; 103 Am. Dec. 78.

² Caldwell v. Neil, 21 La. Ann. 342; 99 Am. Dec. 738.

³ Mayor of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535.

not transcended his written instructions.¹ But *aliter*, as to private instructions given by the principal to the agent.² A stranger to a contract, executed upon one part by an agent, cannot impeach it on the ground that the agent exceeded his authority. The contract is not void for that reason.³ Thus where an owner of land gave a power of attorney to lay it out in lots, and to sell it for the best price, so that no lot should sell for less than a proportionate share of twelve hundred pounds for the whole tract, and the agent sold the whole tract for twelve hundred pounds, it was held that a stranger could not invalidate the sale.⁴ A contract having been made by an agent who had full authority is not affected by his inaccurate report of its terms to his principal.⁵

ILLUSTRATIONS. — By the rules of a railroad (unknown to the passenger), a baggage-master is forbidden to take articles of merchandise on passenger trains. A baggage-master takes a carpet on a train. The railroad is bound: *Minter v. Railroad Co.*,

¹ *Atwood v. Munnings*, 7 Barn. & C. 278; *Towle v. Leavitt*, 23 N. H. 860; 55 Am. Dec. 195; *Schenmelfenich v. Bayard*, 1 Pet. 264; *Andrews v. Kneeland*, 6 Cow. 354; *North River Bank v. Aymar*, 3 Hill, 262; *Munn v. Commission Co.*, 15 Johns. 44; 8 Am. Dec. 219; *Beach v. Vanderwater*, 1 Sand. 265; *Dozier v. Freeman*, 47 Miss. 647; *Payne v. Potter*, 9 Iowa, 549; *Morris v. Watson*, 15 Minn. 212; *Hunt v. Chapin*, 6 Lans. 139; *Baxter v. Lamont*, 60 Ill. 237; *Stainback v. Read*, 11 Gratt. 231; 62 Am. Dec. 648; *De Voss v. City of Richmond*, 18 Gratt. 363; 98 Am. Dec. 647. "The plaintiff's testator taking the notes in suit made by an agent, professing to represent the defendant as his principal, is presumed to have known the terms of the power under which the agent assumed to act. He was bound to ascertain and know the character and extent of the agency, and the words of the instrument by which it was created, before giving credit to the agent. If the testator dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril,

and must abide by the consequences, if the agent acted without or in excess of his authority": *Craighead v. Peterson*, 72 N. Y. 279; 28 Am. Rep. 150.

² *Allen v. Ogden*, 1 Wash. C. C. 174; *Gibson v. Colt*, 7 Johns. 393; *White v. Fuller*, 67 Barb. 267; *Rourke v. Story*, 4 E. D. Smith, 54; *Beals v. Allen*, 18 Johns. 363; 9 Am. Dec. 221; *Johnson v. Jones*, 4 Barb. 369; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Cross v. Haskins*, 13 Vt. 536; *Hunter v. Jamieson*, 6 Ired. 252; *Bradford v. Bush*, 10 Ala. 386; *Hatch v. Taylor*, 10 N. H. 538; *Cruzan v. Smith*, 41 Ind. 288; *Munn v. Commission Co.*, 15 Johns. 44; 8 Am. Dec. 219; *Witherington v. Herring*, 5 Bing. 442; *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; *Robbins v. Magee*, 76 Ind. 381; *Higgins v. Armstrong*, 9 Col. 38. But see *Peters v. Ballister*, 3 Pick. 495.

³ *Jackson v. Van Dalsen*, 5 Johns. 43.

⁴ *Jackson v. Van Dalsen*, 5 Johns. 43.

⁵ *Greeley-Burnham Co. v. Capen*, 23 Mo. App. 301.

41 Mo. 503; 97 Am. Dec. 238. A general agent purchased a larger quantity of goods than the principal authorized. The latter is bound: *Palmer v. Cheney*, 35 Iowa, 281. The proprietor of a stage-coach had an agent in a certain town to attend to all the business of transporting passengers. The agent had secret instructions to forward no goods except baggage or at the risk of the owner. A person who sent goods in ignorance of this instruction could not be affected by it: *Walker v. Skipwith*, Meigs, 502; 33 Am. Dec. 161.¹ A live-stock broker is authorized by letter from A to buy two thousand hogs of a certain description and price, to be delivered at a certain day and place. The broker is a special agent, and has authority only to bind his principal as specified in the letter. *Bell v. Offutt*, 10 Bush, 632. B, expecting to be absent for a time, gave his clerk a power of attorney to draw checks in his name on his bank for fifteen days. The power of attorney was deposited with the bank. After the fifteen days the clerk drew and was paid checks. *Held*, that the bank could not charge them to B: *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69; 16 Am. Rep. 576. A authorizes B to sign his name to a note for a certain sum. He signs it for a larger sum. A is not bound: *Blackwell v. Ketchum*, 53 Ind. 184. An agent for stage company is authorized to obtain surgical aid for an injured passenger. *Held*, that the obtaining of such aid for an injured employee is beyond his authority: *Shriver v. Stevens*, 12 Pa. St. 258. Plaintiffs, having received a check of a third person payable to their order, indorsed it to the order of the cashier of the defendant's bank, put it in an envelope, and sent it by a messenger for deposit. The messenger opened the envelope and presented it at the bank for payment, stating that the plaintiffs desired the money. The bank paid the messenger, and he absconded with the money. *Held*, that the bank was liable: *Bristol Knife*

¹ "It will be seen from this definition of a general agency," said the court, "that if a stage contractor puts a man in his place to transact all his business of a particular kind, as to receive and forward passengers and baggage in the stage, and to receive payment therefor, at any particular stand or stage-office, such person is the general agent of the contractor or owner of the stage. In such case, though the owner of the stage may limit the agent by a private order or direction, still he is bound for all his agent's acts, though not conformable to his direction, if within the scope of his employment, unless this limitation upon the power of the agent be

known to the party dealing with him: *Paley on Agency*, 163. It is not therefore a limitation, by private instructions to the agent, that constitutes a special agency. That is a matter between the principal and agent alone, unless it be disclosed to the party dealing with the agent. If the agent has not acted in conformity to his commission, he is responsible to his principal. By placing the party in the situation of a general agent, the principal has been instrumental in producing the injury through his agent's misconduct, and he ought to suffer for it, rather than a stranger who is equally innocent with himself."

Co. v. First Nat. Bank, 41 Conn. 421; 19 Am. Rep. 519.¹ An employee in a store employed, with the knowledge of the firm, an expressman to make deliveries. *Held*, that the firm was liable for his services: *Pardridge v. La Pries*, 84 Ill. 51.

¹ "The whole case," said Loomis, J., "resolves itself into a mere question of agency. Had the messenger who delivered the check at the bank authority from the plaintiffs to receive money thereon? It is conceded that there was no authority in fact. The only authority of the messenger, in fact, was to deliver to the bank the sealed envelope containing the check and deposit ticket, have the check credited to the plaintiffs, and get the bank-book. He was not in any sense a general agent, he had never done any business for the plaintiffs of any kind, and was an entire stranger to the officers of the bank. He was only a special agent, and that, too, of exceedingly limited authority, and here the familiar and elementary rule of law applies, 'that an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power.' We would not, however, adhere so closely to the literal terms of this rule as to do injustice to innocent third parties, who have acted on the confidence of an apparent authority for which the principal is justly responsible. But in order to bind the principal, he must, by his words or acts, have fully authorized the third party to believe that the agent had authority; and in applying this rule to business transactions, care must be used to distinguish clearly between the act of the principal and the mere act of the agent. If the agent by his act assumes an appearance of authority which induces a third party to believe he has, in fact, authority, it is not sufficient. It is the principal's own act only that gives to the agent an appearance of authority which becomes binding on him. If, then, we look at the act of the plaintiffs, without reference to what the messenger wrongfully assumed, we find that all the plaintiffs did was to indorse the check payable to the order of the cash-

ier, and put it, together with a deposit ticket, in a sealed envelope and hand it to the messenger to carry to the bank. These acts of the plaintiffs do not, it seems to us, imply any authority in the messenger to collect the money on the check. If the sealed envelope, containing the check and deposit ticket, had been presented to the bank in the same shape as delivered to the messenger, it would have been clear that only a deposit was intended. It may be suggested that the presentation by the messenger of the naked check at the bank ought to be considered as authorized by the principal for the purpose of fixing the liability. We do not so regard it. Suppose the envelope had inclosed a written request, relative to the matter, intended for presentation to the cashier, and the messenger had broken the seal and destroyed the writing, and had presented the check by itself, would we judge the principal in such case simply by the fact that the special agent was authorized to present the check? If so, there would be no safety in employing a messenger to do the simplest errand. But if we concede, for the sake of argument, that the authority given to the messenger was to present the check by itself to the bank, we do not think an authority to receive the money can fairly be implied under the circumstances of this case. The circumstances here do not enlarge the apparent scope of the agent's authority, but greatly contract it. The form of indorsement, 'Pay to the order of the cashier,' is unnatural, if the plaintiffs intended to have the bank pay the money to the messenger. The object of this unusual indorsement was, undoubtedly, to prevent the bank from paying the check to any one except the plaintiffs, and everybody except the bank itself would be precluded from collecting it in that form; and, under such circumstances, we think the presentation of this check at the bank by a perfect stranger, who called for the currency on it, ought to have aroused suspicion."

The owner of property permits his agent in possession to represent himself as the owner of it, whereby he obtains credit and makes debts, to satisfy which a levy is made on the property. *Held*, that the owner is estopped to deny the liability of the property: *White v. Morgan*, 42 Iowa, 113. A mortgaged his farm and crops to secure advances, and placed an agent in charge to make the crop and to purchase supplies, to whom he gave a power of attorney to mortgage farm-stock to a certain amount, to procure provision, seed, etc. The agent, finding it impossible to make the crop without more money, and being unable to obtain any from his principal, gave a second mortgage on the crop, to which, instead of the first, he applied the proceeds of the crop. *Held*, that the agent acted without authority throughout: *Skaggs v. Murchison*, 63 Tex. 348. The chief engineer of a railroad company assuming to act for the company employed A to render engineering services. A was ignorant of any limitations on the engineer's powers. *Held*, that the company was liable: *Gillis v. Railroad Co.*, 34 Minn. 301. A hotel steward furnished with money by his employer to buy supplies kept back part of the money. The seller gave credit, not to the steward, but to his employer. *Held*, that the employer must bear the loss: *Goelst v. Meares*, 13 Daly, 30. A resolution of a corporation manufacturing pig-iron stated that "A B of Chicago be and is hereby appointed and employed by this company as its sole agent for the consignment and sale of its entire product, he to receive a commission." *Held*, that A B was entitled as general agent, not only to sell iron when ready for the market, but also to contract for the sale and future delivery of iron to be produced: *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427. A father authorized his son to accept for him three thousand dollars at not less than thirty days' sight, to enable him to go into partnership with S. The son accepted S's draft in favor of N. for four hundred dollars at ninety days, in payment of a debt due from S. to N. *Held*, that the draft was unauthorized: *Nixon v. Palmer*, 8 N. Y. 398. Defendant, negotiating with A for the purchase of a store, said that he should need a clerk, and authorized A to hire one at eleven dollars a week. A hired a clerk at that rate for six months. *Held*, that in hiring for that time he exceeded his authority: *Pasco v. Smith*, 49 Conn. 576. The defendants sent an agent to employ the plaintiff, who was a physician, to visit a boy who was injured, and directed him to tell the plaintiff that they would pay for the first visit. The agent neglected this, and employed the plaintiff generally. The plaintiff attended the boy on the defendant's credit till he recovered. *Held*, that the defendants were liable to the plaintiff for his services: *Barber v. Britton*, 26 Vt. 112. The plaintiff sold certain goods to the defendants through F., their general

agent, who was fully authorized to make the purchase. Afterwards, upon the representation of F. to the plaintiff that it was necessary to send a receipted bill to the defendants in order to obtain payment of it, the plaintiff receipted the bill of the goods and delivered it to F. F. presented the bill thus receipted to the defendants, who paid the amount to him, they having no knowledge of the circumstances under which the receipt was given. The money so received by F. was never paid to the plaintiff. *Held*, in an action of *assumpsit* brought against the defendants for the amount of the bill, that the plaintiff was entitled to recover. F. being the general agent of the defendants and authorized to purchase the goods, he was acting in the whole matter within the scope of his authority, and his acts and declarations were to be considered as the acts and declarations of the defendants, and his knowledge of the circumstances under which the receipt was given as their knowledge. It could not be inferred from the facts that the plaintiff had made F. his own agent in the matter: *Willard v. Buckingham*, 36 Conn. 395. A engaged B to lease a certain piece of land for him at a certain rent or at any rent. B effected the lease, but the lessor, being unwilling to give credit to A, trusted B, and B paid the rent. *Held*, that this was a case of general agency, that the payment by B was within the object of the agency, and that A was liable to an action to recover the money paid without demand: *Irons v. Cook*, 11 Ired. 203. M. & Co., in Boston, wrote letters to B., in New Orleans, as follows: 1. "You may have opportunities to make advances on cotton shipped to this port, and we should be willing to accept against shipments to us the necessary papers accompanying the bills for such sums as in your judgment may be safely advanced." 2. "We do not want cotton under limits. Your advances ought not to exceed three quarters the value. Under these restrictions you may go on, and your bills shall be duly honored, accompanied by bills of lading and orders for insurance." B. showed these letters to C., and sold to him bills drawn on M. & Co. in favor of C.'s principals, and paid, with the money received from C., for cotton, which he shipped to M. & Co. in his own name. No bills of lading or orders for insurance accompanied these bills, and M. & Co. refused to accept or pay them. *Held*, in suits by the payees against M. & Co. as acceptors of the bills, and on their promise to accept and pay them, that they were not liable; that B.'s authority was limited and special, and that he had exceeded it, by drawing the bills without accompanying them with bills of lading and orders for insurance; and that C., the payee's agent, knowing the contents of M. & Co.'s letters to B., took the bills on his personal confidence in B., and not on the obligation of M. & Co. to honor

them: *Murdock v. Mills*, 11 Met. 5. An insurance company appoints an agent in another city, and agrees that he shall receive ten per cent on all premiums for insurance effected by him on their behalf, and also on all moneys received for sales of shares of the stock of the company, made by him, the agency to be revocable at pleasure. *Held*, no implied authority to the agent to bind the company for the rent of an office leased by him: *Brander v. Columbia Ins. Co.*, 2 Grant Cas. 470. An agent for an insurance company was empowered merely to receive written applications for insurance, to transmit them to the company, and if they decided to take the risk, to receive the policy executed by them, and to issue it to the applicant upon receipt from him of the premium. *Held*, not the agent of the company for the making of applications; and if employed by the applicant, or permitted to act for him in drawing up the application, he is his agent, for whose mistakes of fact committed in the statements or answers to interrogatories in the applications he is responsible: *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141. Three tenants in common were erecting a building according to a plan; one gave a power of attorney to his agent, authorizing him to "represent the principal's interest in the property, to vote as to the administration and improvement, and to do all acts relating to said interest, except the sale or hypothecation thereof." *Held*, that the attorney had power to agree to a change in the plan: *Hastings v. Halleck*, 13 Cal. 203. Under a power authorizing the attorney "to superintend my real and personal estate, to make contracts, and generally to do all things that concern my interest in any way, real or personal, whatever," etc. *Held*, that the attorney was empowered to make a contract to convey real estate, and therefore to make a lease with a right to purchase: *De Rutte v. Muldrow*, 16 Cal. 505. A person having engaged an architect to perform the usual labor of architects, and a contractor who was to do the work and furnish the materials, placed the money for the contractor's pay in the hands of the architect, to be paid over on the contractor's order. *Held*, that new contractors for materials, dealing with the architect, could not hold the principal: *Dodge v. McDonnell*, 14 Wis. 553. A power of attorney gave authority to the agent to sell certain lands "for the purpose of making actual settlements thereon," and "to sign, seal, and deliver sufficient deeds, conveying the land in fee-simple, with the several covenants and a general warranty." *Held*, to leave it to the judgment of the attorney to determine whether the purchasers buy for the purpose specified in the power, and if there is no evidence of fraud on the part of the purchaser or of the attorney, the conveyance made under the power will be valid, although it should afterwards appear that the land was purchased, not for

the purpose of settlement, but on speculation: *Spofford v. Hobbs*, 29 Me. 148; 48 Am. Dec. 521. A and B, partners, gave notice of an intended dissolution on a certain day, and A and C gave notice that after that day the business would be continued by them. In the mean time S. sent to A and C a draft drawn by C, payable to S., directing them to place it to his credit, and remit the proceeds. A and B received the letter, and placed the amount to the credit of S. C had at that time a place of business in A and B's counting-room, and probably had access to their books. C wrote to S. that the intended partnership was deferred to enable A and B to settle their concerns, "and that the same attention will be paid to business as would have been by the intended firm." Soon after A and B failed, having made no remittances to S. *Held*, that C was not thereby made the agent of S. to see that A and B made such remittance, and that he was not liable to S. for omitting to do so: *Savage v. Merle*, 5 Pick. 83. An insurance company appointed a person their agent, and gave him authority to receive risks, take applications and premiums, and premium notes. *Held*, that this constituted him general agent of the company, for the transaction of that class of business, and that his fraudulent representations relating to procuring insurance and premium notes bound the company: *Devendorf v. Beardsley*, 23 Barb. 656. The owner of a line of stage-coaches made a lease of the coaches, horses, and stage property for a term of years, the lessee undertaking to carry on the business at his own risk and for his own account, to keep all the property in repair, and to replace all articles worn out, by purchasing others in the name of the lessor. The lessee accordingly bought harnesses for use on the line, on his own credit. *Held*, that the lessor was not liable for the price: *Stiles v. Emerson*, 17 Pick. 326. A sent B to do work for C, and A's book-keeper, after the completion of the work, made out, in accordance with his duty, the bill therefor on one of A's printed billheads, which he placed in the hands of B, who demanded and received payment for the work from C. Upon the billhead was printed in fine type, "All moneys to be paid to the treasurer, and bills to be receipted by him." *Held*, in an action by A against C to recover for the work, that, in the absence of evidence that C saw these words, there was evidence of payment to go to the jury: *Kinsman v. Kershaw*, 119 Mass. 140.

§ 57. **Authority may be Implied.**—Therefore—as to third persons—the authority of the agent need not be express, but may be implied from the performance with the knowledge of the principal of acts of a similar char-

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acter.¹ The presumption is, that one known to be an agent is acting within the scope of his authority.² But the implied agency extends no further than the acts of a like nature to those acquiesced in by the principal.³ An agent's authority to draw checks for his principal will be presumed in the absence of counter-evidence, where the proof shows that the agent was in the habit of signing his principal's name to checks, which was permitted by his principal.⁴ Where a person permits another to assume the apparent ownership or right of disposing of property, it will be presumed that the apparent authority is the real authority. "And therefore, it may be laid down as a general rule that when a commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser will be safe, although the agent may have acted wrongfully and against his orders or duty, if the purchaser has no knowledge thereof."⁵ Evidence of frequent sales by one person, of the property of another, which were known and not objected to, is competent as tending to show that they were made by the permission of the owner, and his knowledge of such sales may, in the absence of direct evidence, be inferred from their frequency and amount, coupled

¹ *Friedlander v. Cornell*, 45 Tex. 585; *Hazeltine v. Miller*, 44 Mo. 177; *Edwards v. Thomas*, 66 Mo. 468; *Cox v. Hoffman*, 4 Dev. & B. 180; *Thompson v. Blanchard*, 4 N. Y. 303; *Edgerton v. Thomas*, 9 N. Y. 40. "If a particular mode is not prescribed by the original power, that which the agent may adopt the principal may, by approving, sanctify, and give to it equal validity as if it had made a part of the original authority. If, in consequence of a notorious agency, the agent is in the habit of drawing bills, and the principal in the habit of paying them, this is such an affirmance of his power to draw that a purchaser of his bills has a right to expect payment of them by the principal, and, if refused, he may coerce it": *Hooe v. Oxley*, 1 Wash. (Va.) 19; 1 Am. Dec. 425.

² *Brett v. Bassett*, 63 Iowa, 340.

³ *Chidsey v. Porter*, 21 Pa. St. 390; *Commercial Bank v. Norton*, 1 Hill, 501; *Stringham v. Ins. Co.*, 4 Abb. App. 315; *Philadelphia etc. R. R. v. Weaver*, 34 M.L. 431; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; 9 Am. Dec. 111; *Wood v. McCain*, 7 Ala. 890; 42 Am. Dec. 612. One who has sold his express business cannot be held answerable for the default of an employee trusted under the belief that he was acting for such former owner: *Rich v. Crandall*, 142 Mass. 117.

⁴ *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474.

⁵ Story on Agency, sec. 94; *Hazewell v. Coursen*, 45 N. Y. 22; *White v. Morgan*, 42 Iowa, 113; *Doubleday v. Cress*, 65 Barb. 181; *Pursley v. Morrison*, 7 Ind. 356; 63 Am. Dec. 424.

with proof of ample means of knowledge.¹ In an action against a bailee of goods for not delivering them, to which the defense is, that he sent them to the plaintiff's wife, the fact that the plaintiff calls his wife to testify that she never asked that they might be sent to her does not authorize the inference that she was the plaintiff's agent.²

ILLUSTRATIONS. — Action for wood sold to A. The plaintiff sold the wood in question to B, who was then engaged in manufacturing bricks for A under a written agreement, by which A was to furnish all necessary materials for making the bricks, except the clay; the wood was delivered at the brick-yard occupied by B, and there used by him in making the bricks for A; A frequently visited the yard while the wood was being so used, and in fact sold a part of the bricks after they had been manufactured. *Held*, that this evidence would justify a finding for the plaintiff: *Emerson v. Patch*, 123 Mass. 541. The plaintiff entered the office of a company owning a line of foreign steamers and dealing in foreign drafts, and gave a sum of money in bills to be exchanged for gold to a person there, who, depositing it in a drawer of a safe that contained other bills and also gold, and making an entry in a book, gave a receipt for the money as money to be exchanged for gold. *Held*, evidence sufficient to be submitted to the jury upon account for money had and received to the plaintiff's use: *Newman v. British and North American Steamship Co.*, 113 Mass. 362.

§ 58. Authority is Restricted to Character in Which It is Given.—The authority is always restricted to the character in which it is given. Thus an authority to bind another in his representative character gives no authority to bind him personally;³ a power generally gives only authority to act in the separate individual business of the principal.⁴

§ 59. Acts must be for Principal's Benefit.—A general agent has no authority to do acts not for the benefit of the principal.⁵

¹ *Bragg v. Boston and Worcester R. R.*, 9 Allen, 54.

² *Jenkins v. Bacon*, 111 Mass. 337; 15 Am. Rep. 33.

³ *Evans on Agency*, 111.

⁴ *Stainback v. Read*, 11 Gratt. 281; 62 Am. Dec. 648.

⁵ *Stainer v. Tysen*, 3 Hill, 279; *Stainback v. Read*, 11 Gratt. 281; 62 Am. Dec. 648; *Debouchet v. Goldsmith*, 5

ILLUSTRATIONS.—A general superintendent of an express company had general authority to employ and discharge agents, to make contracts, and exercise a general supervision over the business of the company. *Held*, that he had no authority to license another to carry on a business in competition with and injurious to the express company: *Adams's Express Co. v. Trego*, 35 Md. 47.

§ 60. Construction of Agent's Authority—In General.

—As to the construction of an agent's authority where it is conferred by a formal instrument, two rules have been laid down by Mr. Evans¹ as important: 1. The meaning of general words in an instrument will be restricted by the context and construed accordingly;² 2. The authority will be construed strictly so as to exclude the exercise of any power not warranted by the actual terms thereof or as a necessary means of executing the authority with effect.³ A written authority given to an agent, which is ambiguous and capable of different meanings, will be construed in favor of innocent third parties dealing with the agent on their interpretation of the authority.⁴ But

Ves. 211; *Stewart v. Woodward*, 50 Vt. 78; 23 Am. Rep. 488; *Wheeler and Wilson Mfg. Co. v. Swan*, 65 Mo. 89; *Lombard v. Winslow*, 1 Kerr, 327; *Dean v. King*, 22 Ohio St. 119; *Calhoun v. Thompson*, 56 Ala. 166; 28 Am. Rep. 754. An authority to draw, indorse, and accept bills, and make and indorse notes, does not authorize the agent to draw a bill for his benefit in the principal's name: *North River Bank v. Aymer*, 3 Hill, 232. Nor does such an authority authorize the agent to draw and indorse accommodation notes for the benefit of third persons: *Wallace v. Branch Bank*, 1 Ala. 565; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 723; *North River Bank v. Aymer*, 3 Hill, 262. An authority to sell personal property does not authorize the agent to sell or pledge it to his own creditor for his own debt: *Stewart v. Woodward*, 50 Vt. 78; 28 Am. Rep. 483; *Parsons v. Webb*, 8 Me. 38; 22 Am. Dec. 220; *Holton v. Smith*, 7 N. H. 443; *Victor Machine Co. v. Heller*, 44 Wis. 265.

¹ Evans on Agency, 204.

² See *Geger v. Bolles*, 1 Thomp. & C. 129; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235; *Holstinger v. Nat. Bank*, 6 Abb. Pr., N. S., 298; *Taylor v. Harlow*, 11 Barb. 235.

³ See *De Rutte v. Muldrow*, 16 Cal. 505; *Berry v. Harriage*, 39 Tex. 638; *Nash v. Mitchell*, 71 N. Y. 199; 27 Am. Rep. 33; *Mills v. Carnly*, 1 Bosw. 164; *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771. Thus a power to represent the principal's interests in a certain locality gives no right to the agent to embark in a new and different business: *Campbell v. Hastings*, 29 Ark. 512. But a power to "bargain and sell, grant, release, and convey," silent as to what property, will be construed to authorize the agent to sell and convey whatever estate the grantor then owned: *Marr v. Given*, 23 Me. 55; 39 Am. Dec. 600.

⁴ *De Tastal v. Cronsillet*, 2 Wash. C. C. 132; *Loraine v. Cartwright*, 3 Wash. C. C. 151; *Cancier v. Ritter*, 4 Wash. C. C. 551; *Mattocks v. Young*, 66 Me. 459.

where the instructions are clear, the agent cannot depart from them.¹ Where the authority is conferred by an informal writing or arises by implication, the rules are,²—1. The writing will be construed so as to give authority to do only such acts as are within the scope of the matter to which it refers; 2. When the authority is implied, it will include all the necessary and usual means of executing it, and all the means justified by the usages of trade.³

The power to employ all the usual and necessary means to execute the authority with effect is an incident of every agency.⁴ The authority of the agent may be enlarged or

¹ *Cameron v. Durkheim*, 55 N. Y. 425; *Corbett v. Underwood*, 83 Ill. 324; 25 Am. Rep. 392; *Marfield v. Douglas*, 1 Sand. 360; *Bertram v. Godfrey*, 1 Knapp, 381; *Wanless v. McCandless*, 38 Iowa, 20; *Stollenwerck v. Thacher*, 115 Mass. 224; *Bliss v. Clark*, 16 Gray, 60; *Bostock v. Jardine*, 3 Hurl. & C. 700; *Baxter v. Lamont*, 60 Ill. 237; *Craighead v. Peterson*, 72 N. Y. 279; 28 Am. Rep. 150. Thus an agent employed to bid for one tract of land has no authority to bid for another and different tract: *Brown v. Johnson*, 12 Smedes & M. 398; 51 Am. Dec. 118. An agent authorized to draw a bill of exchange in his own name cannot draw in the name of his principal: *Bank of Deer Lodge v. Hope Mining Co.*, 3 Mont. 146; 35 Am. Rep. 458.

² *Evans on Agency*, 215.

³ *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 385; *Lawson on Usages and Customs*, secs. 143 et seq.

⁴ *Story v. Stewart*, 9 Heisk. 137; *Franklin v. Ezel*, 1 Sneed, 497; *McAlpin v. Cassidy*, 17 Tex. 449; *Farrar v. Duncan*, 29 La. Ann. 126; *Merrick v. Wagner*, 44 Ill. 266; *Brickenbecker v. Lowell*, 32 Barb. 9; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Ahem v. Goodspeed*, 72 N. Y. 108; *McBean v. Fox*, 1 Bradf. 177; *Peck v. Harriott*, 6 Serg. & R. 146; 9 Am. Dec. 415; *Sprague v. Gullett*, 9 Met. 91; *Fowler v. Bledsoe*, 8 Humph. 509; *Barns v. City of Hannibal*, 71 Mo. 449; *Lovejoy v. Middlesex R. R. Co.*, 128 Mass. 480; *Parkhill v.*

Imlay, 15 Wend. 431; *Leolard v. Graves*, 3 Caines, 226; *Drummond v. Words*, 2 Caines, 360; *Forrester v. Boardman*, 1 Story, 43; *Harter v. Blanchard*, 64 Barb. 617; *Williams v. Getty*, 31 Pa. St. 461; 72 Am. Dec. 757; *Dawson v. Granby*, 2 Pick. 345; *Anderson v. Coonely*, 21 Wend. 279; *Williams v. Seltz*, 31 Pa. St. 464; 72 Am. Dec. 757; *Tucker v. Woolsey*, 64 Barb. 142. An authority given to an agent to transact business for him in a foreign country empowers him to transact it according to the forms and laws of that country: *Owings v. Hull*, 9 Pet. 607. An agent to travel and sell steam-engines has implied authority to hire horses: *Huntley v. Mathias*, 90 N. C. 101; 42 Am. Rep. 517. A traveling salesman and collective agent of a city house hired horses and carriages in the country for use in his employers' business, upon their credit. He neglected to pay for them, although he was provided with money to do so. *Held*, that the principals were liable: *Bentley v. Doggett*, 51 Wis. 224; 37 Am. Rep. 827. "There can be no question," said Taylor, J., "that from the nature of the business required to be done by their agent, the defendants held out to those who might have occasion to deal with him that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may perhaps take judicial notice that such service is usu-

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narrowed by the custom of the country, or the usages of the particular trade or business in which he acts.¹ An agent may be justified under extraordinary circumstances in assuming extraordinary powers, and his ac's, fairly done, will bind his principal.²

§ 61. What Acts are or are not within Particular Phrases—"Accountable"—"All Matters"—"Attend to

ally contracted for, payment to be made after the service is performed. It would seem to follow that, as the agent had the power to bind his principal by a contract for such service, to be paid for in the usual way, if he neglects or refuses to pay for the same after the service is performed the principals must pay. The fault of the agent, in not paying out of the money of his principals in his hands, cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If the party furnishing the service knew that the agent had been furnished by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principals for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay. We think the rule above stated as governing the case is fully sustained by the fundamental principles of law, which govern and limit the powers of agents to bind their principals when dealing with third persons. Judge Story in his work on agency, section 127, says: 'The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited, private instructions unknown to the persons dealing with him.' In section 133, he says: 'So far as an agent, whether he is a general or special agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and bind the principal, the

latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions.' And again, in section 73, in speaking of the power of an agent acting under a written authority, he says: 'In each case the agent is apparently clothed with full authority to use all such usual and appropriate means, unless upon the face of the instrument a more restrictive authority is given, or must be inferred to exist. In each case, therefore, as to third persons innocently dealing with his agent, the principal ought equally to be bound by acts of the agent executing such authority by any of those means, although he may have given to the agent separate, private, and secret instructions of a more limited nature, or the agent may be secretly acting in violation of his duty.' In the case of *Pickering v. Bask*, 15 East, 38, 43, Lord Ellenborough, speaking of the power of an agent to bind his principal, says: 'It is clear that he may bind his principal, within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter, and there would be no safety in mercantile transactions if he could not.' These general principles have been illustrated and applied by this and other courts in the following cases: *Young v. Wright*, 4 Wis. 144; 65 Am. Dec. 333; *Whitney v. State Bank*, 7 Wis. 620; *Long v. Fuller*, 21 Wis. 121; *Houghton v. First National Bank*, 26 Wis. 603; 7 Am. R.p. 107; *Kasson v. Noltner*, 43 Wis. 646; *Smith v. Tracy*, 36 N. Y. 79; *Andrews v. Kneeland*, 6 Cow. 354."

¹ *Lawson on Usages and Customs*, secs. 143 et seq.

² *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604.

Business—"Borrow"—"**Business and Financial Agent**"—"Buy and Sell"—"**Canvass**"—"Cost"—"**Cite and Appear**"—"Claims and Effects."—Where W., as agent for A., sold, but did not transfer, bank stock to C., and promised C. to "be accountable for such dividends as he or his agent should receive" before transfer, it was held that he thereby became C.'s agent to receive such dividends.¹ Where the owners of a certain tannery appointed an agent to act for them in "all matters and business relating to the tannery," it was held that he was not thereby authorized to bind his principals as receiptors to an officer for horses, etc., used in the tannery, which had been attached as the property of a third person.² Power to "attend to business" of the principal does not authorize the agent to sell real or personal property, except to carry on the principal's business;³ nor does a power to "act in all my business as if I were present."⁴ An authority to "borrow" includes authority to give the lender securities for the sum borrowed.⁵ An authority to act as the "business and financial agent" of a corporation does not authorize the execution by him of a mortgage on a locomotive belonging to the corporation.⁶ Where a person authorized another to "buy and sell" negroes for him, it was held that this was a general authority, and that the agent had a right to buy for cash or on credit, at his discretion.⁷ Authority to "canvass" for the sale of sewing-machines does not *per se* confer on the agent power to bind his principal by buying or hiring a horse to aid in carrying on the business. Nor would a ratification by the principal be presumed from his acceptance of the profits of the services, unless he had knowledge of the sources and circumstances thereof.⁸ An authority to

¹ Cropper v. Adams, 8 Pick. 40.

² Weston v. Alley, 49 Me. 94.

³ Coquillard v. French, 19 Ind. 274.

⁴ Ashley v. Bird, 1 Mo. 640; 14 Am. Dec. 313.

⁵ Hatch v. Coddington, 95 U. S. 48.

⁶ Luse v. Isthmus Transit R. R. Co., 6 Or. 125; 25 Am. Rep. 506.

⁷ Ruffin v. Mebane, 6 Ired. Eq. 507.

⁸ Howe Machine Co. v. Ashley, 60 Ala. 496.

sell for "cash" means that the money must be paid when the title passes.¹ An authority to buy for cash will not sustain a purchase on credit.² A power of attorney which gives the agent the authority "to cite and appear" must be construed as conferring upon the agent the power to prosecute and defend suits which may be brought by or against his principal. A sale of property under a judicial proceeding carried on contradictorily with the agent who holds such a power of attorney is not therefore void for want of authority in the agent to represent his principal in the litigation.³ A power to sell "claims and effects" does not include lands.⁴

§ 62. Particular Powers (Continued)—"Collect"—"Deliver"—"Deposit"—"Draw, Indorse, and Accept Bills"—"Execute"—"Give Discharges"—"Hire"—"Indorse."—A power to "collect debts" gives authority to sue, issue execution, and direct the seizure of property;⁵ but it gives no authority to release them without payment.⁶ He may attach the debtor's property,⁷ or (where imprisonment for debt is permitted) arrest him.⁸ An agent to collect a note has no authority to sell it,⁹ or barter the note for negotiable paper or real property.¹⁰ A power to collect a debt gives no right to accept negotiable paper in payment or as collateral security,¹¹ nor to extend the time of pay-

¹ A authorized B to sell property for cash. B on the sale took a check payable the next day. *Held*, not within his authority: *Hall v. Storrs*, 7 Wis. 253.

² *Stoddard v. McIlwain*, 7 Rich. 525.

³ *Miller v. Marmiche*, 24 La. Ann. 30.

⁴ *Cordova v. Knowles*, 37 Tex. 19.

⁵ *Joyce v. Duplessis*, 15 La. Ann. 242; 77 Am. Dec. 185; *Boyd v. Corbett*, 37 Mich. 52; *Bush v. Miller*, 13 Barb. 481; *McMinn v. Richtmeyer*, 3 Hill, 236; *Hushfield v. Landman*, 3 E. D. Smith, 208; *Scott v. Elendorf*, 12 Johns. 317.

⁶ *Melvin v. Lamar Ins. Co.*, 80 Ill. 443; 22 Am. Rep. 199; *Hening v. Hottendorf*, 74 N. C. 588; *McHany*

v. Schenck, 88 Ill. 357; *Chilton v. Willford*, 2 Wis. 1; 60 Am. Dec. 399.

⁷ *Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171; *Fairbanks v. Stanley*, 18 Me. 296.

⁸ See *Stewart v. Biddlecom*, 2 N. Y. 103; *Gorham v. Gale*, 7 Cow. 739; 17 Am. Dec. 549; *Erwin v. Blake*, 8 Pet. 18.

⁹ *Rodgers v. Bass*, 46 Tex. 505; *Hays v. Lynn*, 7 Watts, 524.

¹⁰ *Smith v. Johnson*, 71 Mo. 382.

¹¹ *Wiley v. Manhood*, 10 W. Va. 206; *McCulloch v. McKee*, 16 Pa. St. 289; *Matthews v. Hamilton*, 23 Ill. 470; *Corning v. Strong*, 1 Ind. 327; *Hazeltine v. Miller*, 44 Me. 117; *Scoby v. Branch*, 59 Tenn. 66.

ment,¹ nor to take property instead of money.² An agent who has authority to collect for his principal a note payable in money cannot, by taking without authority notes or claims on a third party in payment, discharge the debtor.³ An authority to carry on mills for the owner, to permit parties to cut timber on his land and to "collect" the stumpage therefor, and to claim indemnity from trespassers, does not imply an authority in the agent to embark his principal in lumbering operations, by which he would be obligated to pay large sums of money.⁴ Authority to an agent in general terms to collect or secure a claim of the principal is not an authority to purchase for the principal the property of the debtor to secure the claim. Such purchase is not the natural or usual means of securing the debt.⁵ Securities being placed in the hands of the agent of the complainants for collection merely, he has no authority to bind the complainants by a contract to assign the securities to their own prejudice, or to the prejudice of their assignors, who have guaranteed the payment of the mortgage debt.⁶ An attorney holding a note for collection cannot confer title by indorsement in the owner's name, and delivery without the owner's consent, even to an innocent purchaser.⁷ One who employs a firm of collecting agents in response to an advertising card, in which they announce that they will treat his debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," giving

¹ *Ritch v. Smith*, 82 N. Y. 627; *Hutchings v. Munger*, 41 N. Y. 155.

² *Ermhart v. Robinson*, 10 Ind. 8; *Taylor v. Robinson*, 14 Cal. 396; *Ward v. Evans*, 2 Ll. Raym. 928; *Kirk v. Heath*, 2 Ind. 322; *Graydon v. Patterson*, 13 Iowa, 256; 81 Am. Dec. 432; *Aulturan v. Lee*, 43 Iowa, 404 (but see *Oliver v. Sterling*, 20 Ohio St. 391); *Ward v. Smith*, 7 Wall. 451; *Rodgers v. Bass*, 46 Tex. 505; *Lumpkin v. Wilson*, 5 Heisk. 555; *Martin v. United States*, 2 T. B. Mon. 89; 15 Am. Dec.

129, where it was said: "We know of no law which authorized the collector of the United States to commute, for whisky, obligations to secure its revenue."

³ *Spence v. Rose*, 28 W. Va. 333.

⁴ *Hazeltine v. Miller*, 44 Me. 177.

⁵ *Taylor v. Robinson*, 14 Cal. 396.

⁶ *Stonington Savings Bank v. Davis*, 14 N. J. Eq. 286.

⁷ *Quigley v. Mexican Southern Bank*, 80 Mo. 289; 50 Am. Rep. 503.

no special instructions, authorizes them to use such means as they see fit to adopt in the prosecution of his business for his benefit, and is responsible therefor.¹

Where books and accounts are placed in the agent's hands "for settlement," he has no right to assign them to a surety of the principal for his indemnity,² nor has an agent authorized to collect a debt.³ An authority to "collect interest" gives no authority to collect the principal.⁴ The employment of an agent to "deliver all freights" necessarily includes the authority to make terms in regard to the delivery.⁵ An agent to "deposit" money for another in a savings bank is not authorized to receive a debt due the depositor.⁶ An authority to "draw, indorse, and accept" bills, and to make and indorse notes negotiable at a particular bank in the name of the principal, does not authorize the agent to draw a bill in the joint name of himself and his principal,⁷ nor to draw a bill in the name of his principal on a person having no funds of the principal in his hands,⁸ or to overdraw his principal's account at a bank.⁹ An authority given by several to indorse their names on a bill drawn in favor of one does not warrant several and successive indorsements, but only a joint indorsement of and for them all.¹⁰ Where a company authorized an agent to "execute a bond and bind their real estate," it was held that this did not authorize him to pledge personally.¹¹ A power of attorney to an agent "to grant, bargain, and sell land, or any part or parcel thereof, for such sum or price and on such terms

¹ Caswell v. Cross, 120 Mass. 545.

² Wood v. McCain, 7 Ala. 800; 42 Am. Dec. 612.

³ Texada v. Beaman, 6 La. 84; 25 Am. Dec. 204.

⁴ Smith v. Kidd, 68 N. Y. 130; 23 Am. Rep. 157; Doubleday v. Kress, 59 N. Y. 410; 10 Am. Rep. 502; Brewster v. Carnes, 103 N. Y. 556.

⁵ Michigan S. etc. R. R. Co. v. Day, 20 Ill. 375; 71 Am. Dec. 278.

⁶ Butman v. Bacon, 8 Allen, 25.

⁷ Stainback v. Read, 11 Gratt. 251; 62 Am. Dec. 648.

⁸ Stainback v. Read, 11 Gratt. 281; 62 Am. Dec. 648; Craghead v. Peterson, 10 Hun, 596.

⁹ Union Bank v. Mott, 39 Barb. 180.

¹⁰ Bank of United States v. Beirne, 1 Gratt. 234; 42 Am. Dec. 551.

¹¹ Ravenel v. Lyles, Spear Eq. 231.

as to him shall seem meet, and for me and in my name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for the same with or without covenants and warranty," authorizes him to sell on reasonable credit, to receive the purchase-money, to sell for other consideration than money, and to sell an undivided interest.¹ But one empowering him, among other things, "to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor," does not authorize such attorney to sell and convey lands to which, as the proper record shows, the principal has acquired title before the execution of the power.² An attorney authorized, upon the receipt of certain debts secured by a mortgage, to "give discharges," can give such acquittances only upon the receipt of the sum due; he cannot enter into any speculations by which the value of the security may perhaps be enhanced.³ Authority given by a father to a son to "hire" a farm-laborer authorizes a contract for a term of two months.⁴ A power of attorney to one to sign and "indorse" notes for him and in his name at a bank gives the latter authority to sign and indorse any note payable at and due to that bank, and no other.⁵

§ 63. Particular Powers (Continued) — "Invest" — "Lands" — "Lay out" — "Loan" — "Make Deeds and Sales" — "Manage" — "Mortgage" — "Obtain Securities" — "Place" — "Procure a Purchaser." — A power to "invest" money and look after one's business does not authorize an agent to sell a principal's property.⁶ Where a power of attorney to invest money authorizes the agent to use the principal's signature and seal, when proper, in

¹ Carson v. Smith, 5 Minn. 78; 77 Am. Dec. 539.

² Greve v. Coffin, 14 Minn. 345; 100 Am. Dec. 230.

³ Chilton v. Willford, 2 Wis. 1; 60 Am. Dec. 399.

⁴ Decker v. Hassel, 26 How. Pr. 528.

⁵ Morrison v. Taylor, 6 T. B. Mon. 82.

⁶ Smith v. Stephenson, 45 Iowa, 645.

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transacting the principal's business, the agent may, on payment of a loan of his principal's money, reassign a bond assigned as collateral security therefor.¹ A power to convey "lands" has been construed to relate to after-acquired lands.² Where the principal agent of a company was primarily employed "to lay out the grounds of a company in order to dispose of them," it was held that he had authority to lay out and dedicate for highways land of the company.³ Where a woman made her husband her agent to lease her lands, it was held that she was not bound by his attempt to subject the rents to a lien for agricultural supplies advanced to the tenant, the lienor believing the land to belong to the husband, but she having done nothing to foster the belief.⁴ An authority to make a "loan" gives no authority to receive payment of the note given for the money loaned,⁵ or to collect generally.⁶ An agent having a principal's money, to "loan, manage, and collect" as he deems best, has authority to make an agreement for the extension of the time of payment.⁷ An authority simply to loan money, and take security for the payment, does not imply a power to collect.⁸ A power of attorney to make "all such deeds of conveyance and of partition to such lands as I am entitled to" authorizes a deed of sale as well as a deed of partition.⁹ A power to "make and execute conveyances" authorizes the agent to sign a deed.¹⁰ An authority to "make notes" in the name of the principal does not authorize the agent to make accommodation notes.¹¹ A salesman authorized to "make sales," and selling on credit, is not authorized subsequently to collect the price in the name of his principal, and a pay-

¹ Feldman v. Beier, 78 N. Y. 293.

² Berkey v. Judd, 22 Minn. 288.

³ State v. Atherton, 16 N. H. 203.

⁴ Loftin v. Crossland, 94 N. C. 76.

⁵ Austin v. Thorp, 30 Iowa, 376.

⁶ Cooley v. Willard, 34 Ill. 69; 85 Am. Dec. 276.

⁷ Hurd v. Maple, 2 Bradw. 402.

⁸ Cooley v. Willard, 34 Ill. 68; 85 Am. Dec. 296.

⁹ Jackson v. Hodges, 2 Tenn. Ch. 276; see also Execute Papers and Deeds, *supra*.

¹⁰ Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543.

¹¹ Gulick v. Grover, 33 N. J. L. 463; 97 Am. Dec. 728.

ment to him will not discharge the purchaser, unless he can show some authority in the agent to collect, beyond that necessarily implied in a mere power to make sales.¹ A power of attorney to "manage" all the lands of the principal embraces after-acquired lands.² A general authority given to "manage" a person's property cannot be considered as an authority to employ counsel in a case concerning property belonging to another person.³ An agent to "manage" a hotel has no implied power to bind his principal for the safekeeping and return of carriages furnished by a livery-stable keeper for guests of the hotel.⁴ A power to "mortgage" land does not authorize the giving of the principal's note with the mortgage, so as to make him personally liable.⁵ A general power to mortgage A's property will not sustain a mortgage for the benefit of B.⁶ Where an agent was directed to "obtain securities" for the payment of protested notes, and to hand them over, when obtained, to certain creditors of the principal, and the agent, not obtaining new securities, gave the notes to the creditors after the death of his principal, it was held that their title to the notes was good.⁷ Where a principal wrote to his agent that he proposed to "place" his goods at a certain price, it was held that this gave the agent no authority to warrant that his principal would not sell for a less price.⁸ An authority to "procure a purchaser" for property does not give power to enter into a contract of sale.⁹

**§ 64. Particular Powers (Continued)—"Purchase"—
"Rent and Care for"—"Receive Checks"—"Release."—**
An authority to "purchase"—the agent not being furnished with funds—permits him to purchase on credit,

¹ *Law v. Stokes*, 3 Vt. 249.

² *Berkey v. Judd*, 22 Minn. 287.

³ *Perry v. Jones*, 18 Kan. 552.

⁴ *Brockway v. Mullin*, 46 N. J. L. 448; 50 Am. Rep. 442.

⁵ *Mylius v. Cope*, 23 Kan. 617.

⁶ *Greenwood v. Spring*, 54 Barb. 375.

⁷ *Nicolet v. Pillot*, 24 Wend. 240.

⁸ *Anderson v. Bruner*, 112 Mass. 14.

⁹ *Hamer v. Sharp*, L. R. 19 Eq. 108.

and give the principal's note,¹ but ordinarily a mere authority to purchase gives no power to purchase on credit,² or to give the principal's note,³ or to buy a larger or a smaller quantity than ordered,⁴ or to sell or exchange the property.⁵ Where an agent for the purchase of lumber receives instructions by letter to "purchase" certain quantities of lumber for sale, he is only bound to a substantial compliance with his instructions as to quantity, and a slight difference in that respect will not be considered a violation of his authority, such as to entitle his principal to reject the purchase.⁶ A clerk employed under a written agreement to "purchase goods," and conduct a mercantile house in a certain place, "upon the cash system," with a certain sum of money put in his hands for that purpose, cannot bind his principal for goods purchased for the house on credit.⁷ A general authority to purchase grain gives the agent no power to contract to take all the grain the seller can deliver, especially if the contract does not bind the seller to deliver any.⁸ An agent of a commission house, authorized to purchase hides, etc., and to pay for them with his principal's money, may not make advances or guarantee payment of unsettled accounts received in satisfaction of unauthorized advances.⁹ An authority to the manager of a farm to purchase mules, implements, and supplies for the farm, gives no authority

¹ *Sprague v. Gillett*, 9 Met. 91; *Bank v. Bugby*, 1 Abb. App. 86; *Perrotin v. Cucullu*, 6 La. 587; *Fatman v. Leet*, 41 Ind. 133. So as to the general manager of a hotel as to supplies for it: *Beecher v. Venn*, 35 Mich. 466. So, where giving the note is indispensable to the carrying on of the business: *Temple v. Pomroy*, 4 Gray, 128; and see *Adams v. Boies*, 24 Iowa, 96. An authority to "purchase" wheat includes authority to give directions as to its delivery: *Owen v. Brockschmidt*, 54 Mo. 285.

² *Berry v. Barnes*, 23 Ark. 411; *Stoddard v. McIlwain*, 7 Rich. 525; *Stubbings v. Heintz*, 1 Peake, 66.

³ *Emerson v. Hat Co.*, 12 Mass. 237; 7 Am. Dec. 66; *Savage v. Rix*, 9 N. H. 263; *Gould v. Norfolk Lead Co.*, 9 Cush. 338; 57 Am. Dec. 50; *Taber v. Cannon*, 8 Met. 456; *Paige v. Stone*, 10 Met. 160; 43 Am. Dec. 420; *Torrey v. Dustin Mon. Ass'n*, 5 Allen, 327; *Denison v. Tyson*, 17 Vt. 549; *Hazeltine v. Miller*, 44 Me. 177; *Bank v. Bugbee*, 1 Abb. App. 86.

⁴ *Olyphant v. McNair*, 41 Barb. 446.

⁵ *Todd v. Benedict*, 15 Iowa, 591.

⁶ *Merriman v. Fulton*, 29 Tex. 97.

⁷ *Stoddard v. McIlwain*, 7 Rich. 525.

⁸ *Hartwell v. Walker*, 4 La. Ann. 457; 50 Am. Dec. 577.

⁹ *Bohart v. Oberne*, 36 Kan. 284.

to buy goods for the laborers.¹ An authority to purchase a town site, and lay out a town, gives power to dedicate land for the use of a street.² The general agent of a non-resident merchant has power to authorize a clerk to apply to the gas company to let on gas to the principal's counting-room.³ Where an agent was appointed by the owner to "rent and care for" real estate, he was held not authorized to sue in his own name to recover possession of the property from a claimant under a tax deed.⁴ An authority to "receive checks" in payment does not authorize the agent to indorse or collect them.⁵ A power to "release" an absolute debt includes authority to release a contingent liability.⁶

§ 65. Particular Powers (Continued)—"Sell"—"Sell and Convey"—"Sell at Retail."—A power to sell land gives the agent power to execute a deed and convey with a covenant of seisin.⁷ A verbal authority to "sell" realty

¹ *Carter v. Burnham*, 31 Ark. 212; and see *Meyer v. Baldwin*, 52 Miss. 263.

² *Bartean v. West*, 23 Wis. 416.

³ *Shepherd v. Milwaukee Gas etc. Co.*, 11 Wis. 234.

⁴ *McHenry v. Painter*, 53 Iowa, 365.

⁵ *Graham v. U. S. Savings Inst.*, 46 Mo. 186.

⁶ *Shaw v. Berry*, 35 Me. 279; 53 Am. Dec. 702.

⁷ *Le Roy v. Beard*, 8 How. 451; *Taggart v. Stanbery*, 2 McLean, 543; *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715; *Hemstreet v. Burdick*, 90 Ill. 444; *Jackson v. Hodges*, 2 Tenn. Ch. 276; *People v. Boring*, 8 Cal. 407; *Fogarty v. Sawyer*, 17 Cal. 591; *Yale v. Eames*, 1 Met. 488; *Alexander v. Walter*, 8 Gill, 239; 50 Am. Dec. 688; *Inhabitants v. Clark*, 63 Me. 87; 28 Am. Rep. 22. A power of attorney to sell one's real estate held to authorize a quitclaim deed of land which may not have been owned by the person giving the power: *Alexander v. Goodwin*, 20 Neb. 216. Where, in a power of attorney to sell real estate,

it appears that the term "to sell" is used in the ordinary sense, and the general tenor of the instrument is to confer a power of disposal, the authority to execute the proper conveyance is necessarily incident, although the term "to convey" is not used: *Farnham v. Thompson*, 34 Minn. 330. But see *Force v. Dutcher*, 18 N. J. Eq. 401; *Nixon v. Hyserott*, 5 Johns. 58; *Lyon v. Pollock*, 99 U. S. 668. In *Valentine v. Piper*, 22 Pick. 85, 33 Am. Dec. 715, it was said: "Some objection was taken to the legal effect of this instrument. It purported to authorize the attorney to make sale of the real estate of the constituent, as therein described, but there were no express words authorizing the attorney to execute a deed or deeds. But the court are of opinion that the instrument is not open to this exception. Where the term 'sale' is used in its ordinary sense, and the general tenor and effect of the instrument is to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law, to carry such sale into effect, is neces-

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is insufficient to authorize the execution of a contract or the making of a deed.¹ Authority to agents, not under seal, to "sell" land empowers them to make an executory contract to sell.² An agent with a restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land.³ A power authorizing the attorney

sarily incident. It is in pursuance of a general maxim that an authority to accomplish a definite end carries with it an authority, so far as the constituent can confer it, to execute the usual legal and appropriate measures proper to accomplish the object proposed. A power of attorney might be so drawn as to authorize the attorney to make sale of an estate, where it might be apparent that it was the intention of the constituent to authorize the attorney to negotiate for a sale, leaving it to the constituent afterwards to ratify it and to execute deeds. Should it appear either from the restricted words used, or from the tenor of the whole instrument, that such was the intent, it ought to be construed as conferring such a restricted power only. In the present case, we think it was the intent of the constituent to confer on the attorney an authority to transfer the estate."

¹ *Duffy v. Hobson*, *post*; *Treat v. De Celis*, 41 Cal. 202; *Force v. Dutcher*, 18 N. J. Eq. 401; *Pringle v. Spaulding*, 53 Barb. 17. "This," to simply find a purchaser, it is said in *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617, "is the settled construction put upon the employment of professional brokers 'to sell' or 'to close a bargain' concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent 'to sell' should have a more extended meaning. Besides, a sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. The deed of conveyance may be one with full covenants of seisin and warranty, or only those covenants imported by the use of the words 'grant, bargain, and sell' under our statute, or it may be by quitclaim merely.

The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory, and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the mean time lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor. Now, a mere authority 'to sell' can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination. And yet, unless the agent do have such power, he cannot make a definitive contract, or one that could be said to have the certainty requisite to deprive the principal of his option to ultimately decline to make the sale. To give to the mere word 'to sell' such a broad signification as that would be to invest the agent with powers of that ample and discretionary character usually only conferred with caution, and by means of a general letter of attorney, where the terms are distinctly expressed. While it is true that a power to sign the name of a principal to a contract of sale may be given verbally, we think that the words used for the purpose should be distinct and clear in their meaning and import, and should, with the requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker."

² *Jackson v. Badger*, 35 Minn. 52.

³ *National Iron Co. v. Bruner*, 19 N. J. Eq. 331.

in fact to sell "the one half" of a lot of land, without specifying which, or whether an undivided half, empowers him to sell one half in severalty, exercising his own discretion as to which half.¹ Where a letter of attorney authorizes an agent to sell all the land of the principal, which the latter had not previously conveyed, the agent may convey what his principal had previously sold but not conveyed.² An agent empowered to sell and convey land conveyed to A, who paid part in cash, and, in pursuance of an agreement for a loan from B, mortgaged to the agent, who immediately assigned the mortgage and indorsed the notes to B, who thereupon handed him the amount of the loan. It was held that the transaction was a sale for cash within the agent's authority, and not a barter or a sale on time.³

Under a general power to sell property, real or personal, the agent may make a contract of sale.⁴ An agent intrusted with personal property to sell may make a conditional sale on trial, or a contract to take effect as a sale in case the article on trial works satisfactorily.⁵ An agent authorized to sell has authority to take all the usual steps to effect a sale;⁶ but not to agree to pay a commission to another for making sales.⁷ An agent to sell goods and collect the price has authority to make any deduction from the price that the principal could have made.⁸ Authority to an agent to sell goods is no authority to barter nor to exchange,⁹ nor to rescind the sale, or materially modify its terms, after it has become an executed con-

¹ *Alemanly v. Daly*, 36 Cal. 90.

² *Mitchell v. Maupin*, 3 T. B. Mon. 185.

³ *Plummer v. Buck*, 16 Neb. 322.

⁴ *Haydock v. Stow*, 40 N. Y. 363.

⁵ *Oster v. Mickley*, 35 Minn. 245.

⁶ *Fay v. Richmond*, 43 Vt. 25; *Peters v. Farnsworth*, 15 Vt. 155; 40 Am. Dec. 671; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Haydock v. Stow*, 40 N. Y. 363. Agents were authorized to sell land on certain conditions. They, on receiving an executed deed

from the principal, allowed the deed and purchase notes to be placed in the hands of a third person until an alleged lien should be removed. *Held*, not within their authority: *Taylor v. White*, 44 Iowa, 295.

⁷ *Atlee v. Fink*, 75 Mo. 100; 42 Am. Rep. 365.

⁸ *Taylor v. Nussbaum*, 2 Duer, 302.

⁹ *Taylor v. Starkey*, 59 N. H. 142; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611; *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795.

tract.¹ An agent who is only authorized to sell notes cannot bind his principal by a guaranty of their payment.² Instructions to sell a vessel for "fourteen thousand dollars cash, free of all charges whatsoever," mean charges of sale, not expenses on account of a previous voyage, such as wages and provisions.³ One authorized to sell on credit has no authority to foreclose a mortgage which he has taken as security, nor to buy in for the principal at the sale.⁴ Where a principal authorizes his agent to "sell upon credit," a reasonable credit is meant, which reasonableness is a question to be determined by the evidence.⁵ An agent to sell land on credit has no implied authority to receive payment therefor, nor to receive payment before due, or in anything but money.⁶ An agent authorized to sell his principal's sherry, when manufactured, is not authorized to sell it before it is manufactured.⁷ The mortgagee of a stock of goods signed at the foot of the mortgage a memorandum whereby he appointed the mortgagor his agent to sell and dispose of and replace the stock. This was held not to make the mortgagor an agent of the mortgagee for the purchase and sale of goods, but merely a waiver of the right to take possession.⁸ One authorized to "sell and convey" property has no right to make a voluntary conveyance to an agent to enable him to control and protect the property,⁹ nor to make partition of the land.¹⁰ An authority to sell at retail does not authorize a clerk to sell at wholesale to satisfy a debt due to the purchaser from the principal.¹¹

§ 66. Particular Powers (Continued)—"Settle"—
"Ship"—"Sign Name"—"Solicit"—"Subscribe"—

¹ *Adrian v. Lane*, 13 S. C. 183.

² *Graul v. Strutzel*, 53 Iowa, 712.

³ *Dusar v. Perit*, 4 Binn. 361.

⁴ *Aultman v. Jones*, 1 Woolw. 99.

⁵ *Brown v. Central Land Co.*, 42 Cal. 257.

⁶ *Mann v. Robinson*, 19 W. Va. 49; 42 Am. Rep. 371.

⁷ *Merriam v. De Turk*, 66 Cal. 549.

⁸ *Barrett v. Franklin*, 14 R. I. 241.

⁹ *Dupont v. Wertheman*, 10 Cal. 354.

¹⁰ *Borel v. Rollins*, 30 Cal. 408.

¹¹ *Hampton v. Matthews*, 14 Pa. St. 105; *Lee v. Tings*, 7 Md. 235.

"Sue"—"Take Care of"—"Transact."—A power to settle up a mercantile business gives no authority to purchase real estate or to give a note for the purchase price.¹ An attorney authorized by salvors to "settle" their claims against the vessel saved has authority to receive the money, but not to afterwards distribute it upon his own judgment among the salvors, or to pay charges against the fund.² Where a physician leaving home temporarily made R. his agent, by verbal appointment, to transact all business for him in Alabama, and left with him his books of account for services "for settlement," it was held that R. had no authority to assign the books to a surety of his principal as security for his suretyship.³ A clerk in a store authorized to settle a claim against a carrier for the loss of certain goods cannot give a discharge without receiving any consideration. His mere agreement to receive other goods in place of those lost will not operate as a release of the carrier's liability.⁴ A power to settle business and collect claims gives an agent a right to execute a replevin bond.⁵ An agent employed to settle attachment suits against the principal has authority to raise money to settle by executing a note.⁶ Authority given to an agent to ship property carries with it authority to accept a bill of lading, or to make a contract containing exemptions from liability.⁷ Authority to ship cotton and

¹ *Fisher v. Salmon*, 1 Cal. 413; 54 Am. Dec. 297. A sent over due county bonds to B, requesting him to treat them as his own, and do the best to settle them. Held, this did not authorize B to sell the bonds to D, or to empower C to do so: *Hannon v. Houston*, 18 Kan. 561.

² *Hawkins v. Avery*, 32 Barb. 551.

³ *Wood v. McCain*, 7 Ala. 800; 42 Am. Dec. 612.

⁴ *Patterson v. Moore*, 34 Pa. St. 69.

⁵ *Merrick v. Wagner*, 44 Ill. 266.

⁶ *Tanner v. Hastings*, 2 Bradw. 283.

⁷ *Moriarty v. Harnden's Ex.*, 1 Daly, 227; *Christenson v. American Ex. Co.*, 15 Minn. 270; 2 Am. Rep. 122; *Shel-*

ton v. Merchants' Dispatch Trans. Co., 36 N. Y. Sup. Ct. 527; 59 N. Y. 258; *Robinson v. Merchants' Dispatch Trans. Co.*, 45 Iowa, 470; *Meyer v. Harnden's Ex. Co.*, 24 How. Pr. 290; *Bean v. Green*, 12 Me. 422; *Fillebrown v. Grand Trunk R. R. Co.*, 75 Me. 462; 92 Am. Dec. 606; *Levy v. Southern Ex. Co.*, 4 S. C. 234. "That the plaintiff herself never read the paper [a bill of lading containing conditions] is of no moment. The arrangement was made by her agent, who must be presumed to have acquainted herself with the terms of the engagement which the defendant assented to": *Steers v. Liverpool Steamship Co.*, 57

forward the bills of lading to the consignee does not imply authority to receive advances from the consignee; and while authority to ship and sell may imply authority to receive the proceeds, it does not confer authority to appropriate the proceeds to payment of the agent's individual debts.¹ But a mere agent to deliver the property has no authority to make a contract with exemptions from liability, as, for instance, a drayman.² To "use and sign my name," for the purpose of obtaining accommodation at a bank, gives an agent power to sign a note.³ A person, whether he can himself write or not, may authorize another by parol to sign his name to an instrument.⁴ A power "to solicit and take contracts" does not carry with it the power to collect; and a payment to such an agent by one who knew that orders were sent to the principal for his approval does not release from liability to the principal.⁵ An authority to subscribe for stock upon the location and erection of certain railroad improvements does not authorize a subscription payable on the location of such improvements.⁶ An authority to sue for a debt, and to do all in the premises that the principal could do, gives power to attach.⁷ An agent appointed to "take care of" personal property, and to give notice of any lien upon it, has no authority to make an agreement with a third person to purchase the property of his principal, at a sale to which it is exposed, to satisfy rent under a distress warrant, and therefore the principal cannot maintain an

N. Y. 1; 15 Am. Rep. 453; *Squire v. N. Y. Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

¹ *Hill v. Helton*, 80 Ala. 528.

² *Southern Ex. Co. v. Armstead*, 50 Ala. 350; *Nelson v. R. R. Co.*, 48 N. Y. 498; *Buckland v. Adams Ex. Co.*, 97 Mass. 124; 93 Am. Dec. 68; *contra*, *Robinson v. Merchants' Trans. Co.*, 45 Iowa, 470.

³ But not an instrument not a negotiable note: *First Nat. Bank v. Gay*,

63 Mo. 33; 21 Am. Rep. 430. Authority to sign a principal's name to a note for a specified sum is special, and if he signs a note for more it is a forgery, and the principal is not liable: *King v. Sparks*, 77 Ga. 285; 4 Am. St. Rep. 85.

⁴ *Handyside v. Cameron*, 21 Ill. 588; 74 Am. Dec. 119.

⁵ *Greenhood v. Keator*, 9 Ill. App. 183.

⁶ *Drover v. Evans*, 59 Ind. 454.

⁷ *De Poret v. Gusman*, 30 La. Ann. 930.

action of trover upon this agreement against such third person, unless he ratifies the act of his agent before trial.¹ Authority to an agent "to trade off said mule if he could get anything that suited him" does not empower him to exchange the mule for another, and bind his principal to pay a sum of money as the estimated difference in value.² A person "with full authority to transact any business, to employ men, purchase logs, sell timber, or to perform any other business connected" with his principal, has a general authority, and may transfer lumber in payment to men employed by him.³ The owners of a tavern, by an instrument in which they recited that they had engaged R. to keep said tavern, empowered him for them, and in their names, and for their use and benefit, "to transact all business pertaining to said tavern, which in his judgment might promote their interest, and to purchase, use, and vend all necessary provisions for said house," and "to act for us as fully and effectually as we could do" if present. It was held that R. was authorized to purchase spirituous liquors, wine, and sugar on the credit of the owners, to be used at the bar of said tavern.⁴

§ 67. What Powers Implied under Particular Circumstances — Advertising — Admissions — Arbitrate — Assign — Auction — Board at Hotel — Borrow — Cancel — Compromise — Collect — Confess Judgment.—A general agent of a patent-medicine manufacturer has no authority to make contracts for advertising in foreign countries.⁵ What an agent says while acting within the scope of his authority is admissible against his principal, as part of the *res gestæ*, but not statements or representations made by him at any other time. And declarations made by the officers of corporations rest upon the same principles

¹ *Brisbane v. Adams*, 3 N. Y. 129.

⁴ *Cummings v. Sargent*, 9 Met.

² *McMillan v. Wooten*, 80 Ala. 263.

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³ *Taylor v. Labeaune*, 14 Mo. 572;

⁵ *Holloway v. Stephens*, 2 Thomp.

17 Mo. 338; *Tappan v. Bailey*, 4 Met. & C. 562.

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as apply to other agents.¹ An agent has no power, without express authority, to refer disputes to arbitration.² An authority to "settle" does not authorize the agent to submit the disputes to arbitration.³ But the power may be implied from an authority to "act on the principal's behalf in dissolving the partnership, and appoint any other person as he may think fit";⁴ or from an authority to prosecute a suit⁵ or to "compromise or compound" a claim.⁶ A power to sell or lease lands, to take charge of them and to prosecute suits, receive money, etc., does not authorize the agent to assign a cause of action for a trespass on the lands;⁷ nor does a power to enforce in every way a claim confer authority to assign it to a third person.⁸ A simple power to sell does not include a sale at auction.⁹ An agent employed to sell goods has no implied authority to obtain board at a hotel on the credit of his principal.¹⁰ An agent to buy and sell at the principal's store has no authority to borrow money.¹¹ The authority of an agent who travels to solicit orders for a commercial house does not embrace power to cancel his contracts, and receive back goods shipped to and not satisfactory to a customer.¹² A power to pay debts gives authority to compromise a disputed claim.¹³ Where A and B went to a store, and each purchased a bill of goods, and A guaranteed the payment of B's bill, and subsequently both bills were sent by mail to A, who presented

¹ Penn. R. R. Co. v. Books, 57 Pa. St. 339; 98 Am. Dec. 229.

² Michigan Cent. R. R. Co. v. Gougar, 55 Ill. 533; Trout v. Emmons, 29 Ill. 433; 81 Am. Dec. 326; Alexandria Canal Co. v. Swann, 5 How. 83; Carnochan v. Gould, 1 Bail. 179; 19 Am. Dec. 668; McPherson v. Cox, 86 N. Y. 472; and see Goodson v. Brooke, 4 Camp. 163.

³ Scarborough v. Reynolds, 12 Ala. 252; Huber v. Zimmerman, 21 Ala. 488; 56 Am. Dec. 255. See Hine v. Stephens, 33 Conn. 504.

⁴ Henley v. Soper, 8 Barn. & C. 16.

⁵ Buckland v. Conway, 16 Mass. 396.

⁶ Wilks v. Back, 2 East, 142; Schoff v. Bloomfield, 8 Vt. 472.

⁷ Geiger v. Bolles, 1 N. Y. Sup. Ct. 129.

⁸ Garrigue v. Loescher, 3 Bosw. 578.

⁹ Towle v. Leavitt, 23 N. H. 360; 55 Am. Dec. 195.

¹⁰ Sampson v. Singer Mfg. Co., 5 S. C. 465.

¹¹ Spooner v. Thompson, 48 Vt. 259.

¹² Diversy v. Kellogg, 44 Ill. 114; 92 Am. Dec. 154.

¹³ Bergenthal v. Fiebrantz, 48 Wis.

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B's bill to him, representing that he had authority to collect it, whereupon B paid it, it was held that the mere delivery of the bill by the creditor to A through the post-office did not constitute A the creditor's agent for the collection of the debt, nor was it any evidence of authority to collect it.¹ A general agent, without express authority, cannot confess judgment for his principal.²

§ 68. What Powers Implied (Continued)—Employing Agents—Employing Counsel—Exchange or Barter—Deliver—Foreclose Mortgage.—An agent of a stage company authorized to obtain surgical aid for a passenger injured by the upsetting of the coach is not therefore authorized to employ a physician to attend to one who had acted as coachman without the consent or knowledge of the company, and who had also been injured by the same accident.³ Where a principal wrote to his general agent, "You will do better by getting new agents," etc., it was held that the agent thereby received authority to employ a new subagent.⁴ A general authority to manage property for another does not give power to employ counsel in a case between third persons, but which may indirectly affect the principal's property.⁵ A general agent has no authority to employ counsel to prosecute a suit for a servant of the principal injured through the negligence of a third person.⁶ An agent to sell land must sell for money; he cannot exchange it for merchandise.⁷ So one authorized to sell goods cannot exchange them in barter.⁸ And an authority to "sell, transfer, and convey" lands gives no authority to exchange them for

¹ *Dutcher v. Beckwith*, 45 Ill. 460; 92 Am. Dec. 232.

² *Howell v. Gordon*, 40 Ga. 302.

³ *Shriver v. Stevens*, 12 Pa. St. 258.

⁴ *McConnell v. McCormick*, 12 Cal. 142.

⁵ *Perry v. Jones*, 18 Kan. 552.

⁶ *Cochran v. Newton*, 5 Denio, 482.

⁷ *Lumpkin v. Wilson*, 5 Heisk. 555; *Wheeler and Wilson Co. v. Givan*, 65 Me. 89; *Victor Sewing Machine Co. v. Heller*, 44 Wis. 265; *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Kent v. Bornstein*, 12 Allen, 342.

⁸ *Guerreiro v. Peile*, 3 Barn. & Ald. 616.

other lands.¹ So one employed to sell has no authority to exchange the money he receives with a third person.² Where an agent managing real estate for his principal sold it and took a note and mortgage back, which were left with him for collection, it was held that he was not authorized to exchange them for the unsecured note of another party and to release the mortgage.³ A teamster employed by a mill-owner to deliver flour to a railroad company for transportation has no power, by virtue of his employment, to direct the delivery of the flour by the company to a third person; and the agents of the company are bound to know this, and if they so deliver the flour the company is liable as for a conversion.⁴ An agent authorized to sell on credit has no power to foreclose a mortgage which he had taken to secure payment, nor to buy in the property for his principal on the sale.⁵

§ 69. What Powers Implied (Continued)—Give Credit—Guaranty—Hiring Horses—Indorsing—Lease—Legacy—License—Loan.—An ordinary authority to sell gives no authority to sell on credit,⁶ but the authority may be construed to allow it.⁷ A book-keeper has no power, by virtue of his position, to bind his employer for the debt of a third person.⁸ A traveling salesman and collector has authority to hire horses and carriages in the country,⁹ and so has an agent employed to sell steam-engines.¹⁰ A

¹ *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611.

² *Kent v. Bornstein*, 12 Allen, 342.

³ *Hakes v. Myrick*, 69 Iowa, 189.

⁴ *Sawyer v. Railroad Co.*, 22 Wis. 402; 99 Am. Dec. 49.

⁵ *Aultman v. Jones*, 1 Woolw. 99.

⁶ *School District v. Etna Ins. Co.*, 62 Me. 330; *State v. Delafield*, 8 Paige, 527; *Seiple v. Irwin*, 30 Pa. St. 513; *Law v. Stokes*, 32 N. J. L. 249; 90 Am. Dec. 653; *Burks v. Hubbard*, 69 Ala. 379; *Falls v. Gaither*, 9 Port. 605.

An authority to sell "on credit" means

a reasonable credit: *Brown v. Central Land Co.*, 42 Cal. 257.

⁷ *Van Alen v. Vanderpool*, 6 Johns. 69; 5 Am. Dec. 192; *Greely v. Bartlett*, 1 Greenl. 172. As where the agent was to sell "for the best price he could get and return the proceeds": *May v. Mitchell*, 5 Humph. 365; where he was to sell "to the best advantage": *Ruffin v. Mebane*, 6 Ired. Eq. 507.

⁸ *Ruppe v. Edwards*, 52 Mich. 411.

⁹ *Bentley v. Doggett*, 51 Wis. 224; 37 Am. Rep. 827.

¹⁰ *Huntley v. Mathias*, 90 N. C. 101; 47 Am. Rep. 517.

cashier of a firm which is in the habit of taking commercial paper in the course of business has authority to indorse such paper,¹ and so has an agent employed to discount a note.² But a collector authorized to receive checks in payment of bills held by him for collection has no authority to indorse and collect the checks.³ A general authority to transact business, and receive and discharge debts, gives no power to accept or indorse bills.⁴ Possession of a note not indorsed raises no presumption that the holder has a right to transfer it.⁵ A power to sell land authorizes the leasing of it.⁶ A clerk authorized to receive payment is not authorized to receive a legacy due his master.⁷ A power to sell land will not give an agent authority to license the purchaser, before the conveyance, to enter and cut timber on the land.⁸ Authority in a hired man from his employer to lend property attached and in the custody of the sheriff cannot be inferred from his having exercised such authority before attachment, when the property was in the ordinary use of his employer.⁹

§ 70. What Powers Implied (Continued) — Making Accommodation Notes — or Deed — Negotiable Paper — Mortgage — Pledge — Purchase. — A general agency for the transaction of the principal's business will not authorize the agent to make accommodation notes in his name.¹⁰ A power to make "all such deeds of conveyance and partition to such land as I am entitled to" authorizes a deed of sale as well as of partition.¹¹ A power to "ask, demand, recover, or receive the principal's share of an estate, to give dis-

¹ *Edwards v. Thomas*, 66 Mo. 468.

² *Merchants' Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 665; *Stainback v. Read*, 11 Gratt. 281; 62 Am. Dec. 648.

³ *Graham v. United States Savings Inst.*, 46 Mo. 186.

⁴ *Sewanee Mining Co. v. McCall*, 3 Head, 619.

⁵ *Hardesty v. Newby*, 23 Mo. 567; 75 Am. Dec. 137.

⁶ *Williams v. Woodard*, 2 Wend. 487.

⁷ *Sanderson v. Bell*, 2 Crompt. & M. 313; *Day v. Boyd*, 6 Heisk. 458.

⁸ *Hubbard v. Elmer*, 7 Wend. 446; 22 Am. Dec. 590.

⁹ *Briggs v. Taylor*, 35 Vt. 57.

¹⁰ *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728; *Bank of Hamburg v. Johnson*, 3 Rich. 42; *Wallace v. Branch Bank*, 1 Ala. 565.

¹¹ *Jackson v. Hodges*, 2 Tenn. Ch. 276.

charges and acquittances therefor," does not confer power to convey his real estate.¹ The authority of an agent to execute a deed for his principal may be presumed from proof that the principal received the purchase-money, and that the vendee went into possession under the deed, which on its face purports to have been executed by such agent, and has held such possession for twenty years.² An authority to bind the principal by making negotiable paper must be express or implied from the nature of the agency.³ A general authority to transact business, and to receive and discharge debts, does not authorize the accepting or indorsing of bills, or the making of accommodation paper,⁴ nor does merely acting as clerk give authority to sign notes in the principal's absence.⁵ An agent authorized to transact a particular affair may execute a note jointly with others who have a common interest in the subject-matter, to pay the necessary expenses for the accomplishment of a common end.⁶ A principal clerk, having the general management of a store, and accustomed to give due-bills in the name of his employers with their knowledge and consent, who buys goods in the usual course of business, has authority, upon such purchase, to take up due-bills given for former purchases, and give a note therefor, in the name of his employers, including therein the amount of his last purchase.⁷

A committee of a town appointed to lay out a sum of money voted for repair of highways has no power to give

¹ *Hay v. Mayer*, 8 Watts, 203; 34 Am. Dec. 453.

² *Bias v. Cockrum*, 37 Miss. 509; 75 Am. Dec. 476.

³ *Webber v. Williams College*, 23 Pick. 302; *Rossiter v. Rossiter*, 8 Wend. 496; 24 Am. Dec. 62; *Sewanee Mining Co. v. McCall*, 3 Head, 619; *James v. Lewis*, 26 La. Ann. 664; *Hills v. Upton*, 24 La. Ann. 427; *Taylor v. Robinson*, 14 Cal. 399; *Hefferman v. Addams*, 7 Watts, 116; *Wood v. McCain*, 7 Ala. 800; 42 Am. Dec.

612; *City Bank v. Kent*, 57 Ga. 283; *Pollock v. Cohen*, 32 Ohio St. 514; *Feldman v. Beier*, 78 N. Y. 293; *Temple v. Pomroy*, 4 Gray, 128.

⁴ *Hazeltine v. Miller*, 44 Me. 177; *Lawrence v. Gebhard*, 41 Barb. 575; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728; *Bank of Hamburg v. Johnson*, 3 Rich. 42.

⁵ *Terry v. Fargo*, 10 Johns. 114; *Smith v. Gibson*, 6 Blackf. 369.

⁶ *Layet v. Gano*, 17 Ohio, 466.

⁷ *Chidsey v. Porter*, 21 Pa. St. 390.

a promissory note.¹ A clerk in a store has no power to give a note for money borrowed by him;² nor has an agent employed in the manufacture of carriages power to give notes for labor and materials.³ A person who signs or indorses a note with blanks, and gives it to another to use, impliedly gives him authority to fill the blanks;⁴ and such paper in the hands of a *bona fide* holder will be valid, even though the blanks have been filled by the agent for unauthorized sums.⁵ A special authority conferred upon an agent in the management of a plantation, and the interests connected with it, to demand and sue for all moneys, etc., "subjecting myself to be sued through him, in the same manner as if I was personally present," was held not to give the agent power to execute a note in the name of the principal, or to submit matters in dispute to arbitration before a suit was brought.⁶ Authority not under seal, "to sign any note or other instrument of writing," does not authorize the agent to execute a bill single.⁷ Authority to bind a corporation, by giving a "company note," authorizes a bill of exchange on a person who had no funds.⁸ A power to sell and convey land gives no power to mortgage it;⁹ and so of a power to sell personal property.¹⁰ An agreement by a purchaser of goods, that a third person shall have a lien, by mortgage or otherwise, after a certain time, for a debt due him from the vendor, does not constitute the vendor agent of the purchaser to execute such mortgage.¹¹ One who hires a boiler, and is given the power to sell it, has

¹ *Savage v. Rix*, 9 N. H. 263.

² *Kern v. Piper*, 4 Watts, 222.

³ *Paige v. Stone*, 10 Met. 160; 43 Am. Dec. 421; *Denison v. Tyson*, 17 Vt. 549.

⁴ *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318; *Holland v. Hatch*, 11 Ind. 497; *Spitler v. James*, 32 Ind. 202; 2 Am. Rep. 334; *Blackwell v. Ketcham*, 53 Ind. 184; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427.

⁵ *Id.*

⁶ *Scarborough v. Reynolds*, 12 Ala. 252.

⁷ *Alder v. Buckley*, 1 Swan, 69.

⁸ *Tripp v. Swanzy Paper Co.*, 13 Pick. 291.

⁹ *Morris v. Watson*, 15 Minn. 212; *Gaylord v. Stebbins*, 4 Kan. 42; *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771; *Jeffrey v. Hursh*, 49 Mich. 31.

¹⁰ *Switzer v. Wilvers*, 24 Kan. 354; 36 Am. Rep. 259.

¹¹ *Hyde v. Boston and Barre Co.*, 21 Pick. 90.

no authority to mortgage it, and if he does so, the owner may maintain replevin against the mortgagee.¹ An authority to sell goods does not give power to pledge them;² nor does an authority to receive payment authorize the pledging of a note received for the debt;³ nor does authority to carry on a manufacturing business give power to pledge or mortgage its machinery or buildings.⁴ A clerk of a merchant, to do out-door business, negotiate purchases and charter-parties, and present bills of lading for signature on shipping property of the merchant, has no authority as such clerk to pledge such bills of lading or to receive advances thereon.⁵ A verbal authority from an absconding debtor to assist him "in the settlement of his affairs" will not authorize a pledge of his furniture as security to one of his creditors.⁶ In a New York case an agent was sent to a city for the purpose of hurrying forward certain rails in all possible ways, and to see that there were no delays, as it was important for the principal to have them at once. It was held that the agent could bind the principal to pay a sum for which the rails were held under a claim of lien.⁷ In another, the defendants sent their teamster with a note to the plaintiff to get some rye, saying that they would pay for it later. Plaintiff gave the rye to the teamster, saying that he would not take less than seventy-five cents per bushel for it, and telling him to inform defendants. The teamster called the next day for another load, falsely telling plaintiff that he had told of his price, and that defendants were satisfied with it; whereupon plaintiff gave him another load. In an action by plaintiff to recover the seventy-five

¹ *Stevens v. Cunningham*, 3 Allen, 491.

² *Wheeler and Wilson Sewing Machine Co. v. Givan*, 65 Mo. 89; *Voss v. Robertson*, 46 Ala. 483; *Parsons v. Webb*, 8 Me. 38; 22 Am. Dec. 220; *Victor Sewing Machine Co. v. Heller*, 44 Wis. 265; *Miller v. Schneider*, 19 La. Ann. 300; 92 Am. Dec. 555.

³ *Jones v. Farley*, 6 Greenl. 226; *Hays v. Lynn*, 7 Watts, 524.

⁴ *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203.

⁵ *Zachrisson v. Ahman*, 2 Sand. 68.

⁶ *Swett v. Brown*, 5 Pick. 178.

⁷ *Robinson v. Springfield Iron Co.*, 39 Hun, 634.

cents per bushel, it was held that the teamster's agency was only manual, and that he could not bind his employers by assenting to the price; that consequently the parties had never agreed upon a price, and that only the market value could be recovered.¹

§ 71. What Powers Implied (Continued)—Receive Payment.—An authority to sell chattels gives authority to receive payment,² and authority to receive payment of a debt includes authority to receive part of it.³ An agent to sell goods on credit has implied authority to receive payment,⁴ but not an ordinary agent to solicit orders.⁵ A traveling agent to sell goods, who has not the possession of the goods, may still receive payment so as to bind his principal, where such is the general and known usage, and it has been recognized by the principal.⁶ An ordinary authority to make or conclude a contract gives no authority to receive payments due under it.⁷ An agent to sell land on credit has no implied authority to receive payment.⁸ An agent authorized to receive payment of a debt must receive payment in money.⁹ He has no au-

¹ *Booth v. Bierce*, 38 N. Y. 463; 98 Am. Dec. 73.

² *Rice v. Groffmann*, 56 Mo. 434; *Bicknell v. Buck*, 58 Ind. 354; *Collins v. Newton*, 7 Baxt. 269; *Hoskins v. Johnson*, 5 Sneed, 469. A son who keeps his father's books and accounts, and figures interest on notes, has no authority to collect or settle such notes: *Reynolds v. Ferree*, 86 Ill. 570; and see *Bowen v. School District*, 36 Mich. 149; *Harris v. Simmerman*, 81 Ill. 413.

³ *Whelan v. Reilly*, 61 Mo. 565.

⁴ And the fact that the words "payable at office" are on the bill rendered does not charge the buyer with notice to the contrary: *Putnam v. French*, 53 Vt. 402; 38 Am. Rep. 682. But the words "agents not authorized to collect," in large print on the bill, is constructive notice: *McKindly v. Dunham*, 55 Wis. 515; 42 Am. Rep. 740.

⁵ *McKindly v. Dunham*, 55 Wis. 515; 42 Am. Rep. 740; *Seiple v. Irwin*, 30

Pa. St. 513; *Law v. Stokes*, 32 N. J. L. 249; 90 Am. Dec. 655; *Butler v. Dorman*, 68 Mo. 298; 30 Am. Rep. 795.

⁶ *Meyer v. Stone*, 46 Ark. 210; 55 Am. Rep. 577.

⁷ *Williams v. Walker*, 2 Sand. Ch. 425; *Doubleday v. Kress*, 40 N. Y. 410; 10 Am. Rep. 502; *Kornemann v. Monaghan*, 24 Mich. 36.

⁸ *Mann v. Robinson*, 19 W. Va. 49; 42 Am. Rep. 771.

⁹ *Padfield v. Green*, 85 Ill. 529; *Woodbury v. Larned*, 5 Minn. 339; *Scobey v. Woods*, 3 Baxt. 66; *Stewart v. Woodward*, 50 Vt. 78; 28 Am. Dec. 488; *Sweeting v. Pearce*, 7 Com. B., N. S., 449; *Mann v. Robinson*, 19 W. Va. 49; 42 Am. Rep. 771. Bank bills or other current funds are sufficient: *Rodgers v. Bass*, 46 Tex. 505; *Coleman v. Wingfield*, 4 Heisk. 133; *Dillard v. Clements*, 2 Baxt. 137; but not confederate notes: *Mangum v. Ball*, 43 Miss. 288; 5 Am. Rep. 488; *Webster v. Whitworth*, 49 Ala. 210.

thority to take property in exchange,¹ or negotiable paper of or from the debtor,² or to extend the time of payment in whole or in part,³ nor to receive the debt before it is due,⁴ or only part of it for the whole.⁵

In the absence of special instructions to an agent to collect in gold or silver currency, a payment to the agent in bank bills, or other currency generally taken and used in the payment of debts, and current in business transactions as money, satisfies the debt.⁶ A salesman authorized to make sales on credit has no authority to collect subsequently the price.⁷ An authority to make a contract for the sale of land gives authority to receive so much of the purchase-money as is paid down;⁸ but an authority to sell property does not include authority to receive payment,⁹ nor does an authority to negotiate a bargain.¹⁰ Unless a principal has held his selling agent out to the buyer as having authority to collect, a payment to the agent is not good.¹¹ A canvassing agent for the sale of subscription books has no authority to receive payment for books sold but not delivered by him.¹² A debtor whose debt is evidenced by a written security must see that the person

¹ *Kirk v. Hiatt*, 2 Ind. 322; *Aultman v. Lee*, 43 Iowa, 404. Authority to an agent to receive payment of a debt for his principal does not authorize the agent to receive a part in merchandise: *Rhine v. Blake*, 59 Tex. 240. An agent for the collection of a note is confined to the taking of money in payment, and has no power unless special authority is given to take goods in payment: *Mudgett v. Day*, 12 Cal. 139.

² *Drain v. Doggett*, 41 Iowa, 682; *McCulloch v. McKee*, 16 Pa. St. 289; *Hall v. Storrs*, 7 Wis. 253; *Bertholf v. Quinlan*, 68 Ill. 297.

³ *Hutchings v. Munger*, 41 N. Y. 158; *Chappel v. Raymond*, 20 La. Ann. 277; *Gerrish v. Maher*, 70 Ill. 470.

⁴ *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; *Mann v. Robinson*, 19 W. Va. 49; 42 Am. Rep. 771.

⁵ *Pratt v. United States*, 3 Nott & H. 100; *McHany v. Schenk*, 83 Ill.

357; *Patterson v. Moore*, 34 Pa. St. 69.

⁶ *Rodgers v. Bass*, 46 Tex. 505.

⁷ *Seiple v. Irwin*, 30 Pa. St. 515; *Law v. Stokes*, 32 N. J. L. 249; 90 Am. Dec. 655.

⁸ *Yerby v. Grigsby*, 9 Leigh, 387; *Peck v. Harriott*, 6 Serg. & R. 145; *Goodale v. Wheeler*, 11 N. H. 424; *Hoskins v. Johnson*, 5 Sneed, 469; *Rice v. Goffmann*, 56 Mo. 434; *Johnson v. McGruder*, 15 Mo. 365; *Higgins v. Moore*, 6 Bosw. 344. Power to collect a note given for balance of purchase-money may be inferred from authority to sell land and take note in payment: *Rodgers v. Bass*, 46 Tex. 505.

⁹ *Higgins v. Moore*, 34 N. Y. 417; *Catterall v. Hindle*, L. R. 1 C. P. 186.

¹⁰ *Doubleday v. Kress*, 50 N. Y. 410; 10 Am. Rep. 502; *Austin v. Thorp*, 30 Iowa, 376.

¹¹ *Clark v. Smith*, 88 Ill. 298.

¹² *Chambers v. Short*, 79 Mo. 204.

to whom he pays the debt, as agent of the principal, has the written security in his possession.¹ The presumption of authority of the agent to collect a security for a debt in his custody ceases when the security is withdrawn by the principal from his custody;² so one authorized to sell property, and take a note in payment in principal's name, after he has delivered the note to the principal, has no authority to receive payment thereof.³ Delivering a note, unindorsed, to another for collection, will authorize him to receive payment and deliver it to the maker, but will not authorize him to sue on it for his own use.⁴

ILLUSTRATIONS.—Plaintiff's traveling salesman sold a bill of goods to defendant on credit. Plaintiff forwarded the goods to the latter, together with a letter and bill of items, upon the top of which was printed a provision that payment must be made to the principal, and that salesmen were not authorized to collect. Defendant's book-keeper received the bill, but the printed stipulation was not read, and afterward defendant, at his own place of business, paid the agent for goods. *Held*, that this did not discharge the debt to plaintiff. *Law v. Stokes*, 32 N. J. L. 249; 90 Am. Dec. 655. A writ was issued in the name of A as plaintiff, and at the time of issuing it A indorsed thereon that the suit was brought to the use of B. *Held*, that A thereby made B his agent to receive and collect the amount of the debt sued for, and that as it was for his own use, B might receive anything he thought proper for the debt: *Clark v. Shields*, 3 Hawks, 461. An agent was employed for the purpose of superintending the sale of stoves and hollow-ware for his principal in a given section of country, and authorized to receive payment therefor in different articles of the produce of the country. *Held*, not authorized to execute a note payable in such wares at a future day, and thus bind his principal by his acknowledgment of value received: *Denison v. Tyson*, 17 Vt. 549. Defendant bought ale of B. & Co., who professed to act

¹ *Tappan v. Morseman*, 18 Iowa, 499; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157. But it has been held that the possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, was not alone sufficient evidence of his authority to authorize a payment thereof to him: *Doubleday v. Kress*, 50 N. Y. 410; 10 Am. Rep. 502.

² *Guilford v. Stacer*, 53 Ga. 618; *Haines v. Pohlmann*, 25 N. J. Eq. 179. And this is so even where the debt has been contracted or negotiated through the agent: *Haines v. Pohlmann*, 25 N. J. Eq. 129; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157.

³ *Draper v. Rice*, 56 Iowa, 114; 41 Am. Rep. 88.

⁴ *Padfield v. Green*, 85 Ill. 529.

on their own account. The ale belonged to plaintiff, and was delivered to defendant upon an order for it obtained by B. & Co. from plaintiff. Defendant paid B. & Co. for the ale, and had no knowledge of plaintiff's interest until after the ale was received and paid for. *Held*, that plaintiff cannot sue the defendant for the purchase-money; that the fact that the order of delivery came from plaintiff was not sufficient to give defendant notice of plaintiff's right, and that the transaction comes under the doctrines applicable to agents of an undisclosed principal contracting in their own names, who, when empowered to sell, may receive payment: *Lumley v. Corbett*, 18 Cal. 494. On a bill presented by an agent was printed in red ink, in small type, a direction to pay at the principal's office, or by check to his order. The employment of the agent was to sell by sample. *Held*, that a purchaser who had paid, in good faith, the bill to the agent was released from liability to the principal: *Trainer v. Morison*, 78 Me. 160; 57 Am. Rep. 790.

§ 72. What Powers Implied (Continued) — Renting Store — Rescind Contract. — A principal is liable for the rent of a store occupied by his agent in carrying on his business.¹ An authority to make a contract gives no authority to cancel or rescind it.² An agent to carry out a contract already made cannot change the contract or make a new one.³ An authority to sell gives no power to rescind the sale and adjust damages for a breach of warranty.⁴

§ 73. What Powers Implied (Continued) — To Sell — Settle — Suretyship — Tender — Transfer — Voluntary Conveyance. — A power to conduct and control the principal's affairs in his absence does not authorize the sale of his land,⁵ nor a power to locate land.⁶ To make another "his general and special agent to do and transact all manner of business" does not authorize him to sell stocks or other property of the principal.⁷ One employed to drive

¹ *Tucker v. Woolsey*, 64 Barb. 142; 6 Lans. 482.

² *Stoddard v. Warren*, 7 Rep. 517; *Diversay v. Kellogg*, 44 Ill. 114; 92 Am. Dec. 154; *Stilwell v. Mut. Ins. Co.*, 72 N. Y. 385.

³ *Gerrish v. Maher*, 70 Ill. 470.

⁴ *Bradford v. Bush*, 10 Ala. 386.

⁵ *Watson v. Hopkins*, 27 Tex. 637.

⁶ *Moore v. Lockett*, 2 Bibb, 67; 4 Am. Dec. 683.

⁷ *Hodge v. Combs*, 1 Black, 192.

stock from one town to another has no authority to sell any animal that becomes foot-sore, and his sale passes no title.¹ A request in a letter to put certain accompanying lottery-tickets into such hands as he shall think safe will not authorize a sale by him on credit.² Where one authorized his debtor to leave a note or the money with his son, it was held that no authority could be implied from this for the son to sell the note to a stranger.³ There is, ordinarily, no implied authority on the part of a commercial traveler to sell the samples intrusted to him.⁴ A telegraph operator cannot settle claims against the company.⁵ One cannot bind his principal as surety unless specially authorized.⁶ A tender to an agent authorized to receive payment binds the principal.⁷ A transfer is valid where the owner of bank stock delivers a certificate thereof with an indefinite power of disposition in blank to his agent, who, representing it as his own, transfers the certificate and power to a purchaser in the course of business as payment for a loan.⁸ A power to sell realty for such price and on such terms as might seem meet will not authorize a conveyance in consideration of natural love and affection,⁹ or for a nominal consideration only.¹⁰

§ 74. What Powers Implied (Continued)—Waiver—Warranty.—An agent to sell and deliver thrashing-machines, the purchaser to return the machine within a certain time if it does not work well, has authority to waive such return.¹¹ An agent to receive articles cannot dispense with their delivery.¹² The authority to make

¹ *Reitz v. Martin*, 12 Ind. 306; 74 Am. Dec. 215.

² *Brown v. Bull*, 3 Mass. 211.

³ *Ames v. Drew*, 31 N. H., 475.

⁴ *Kohn v. Washer*, 64 Tex. 131; 53 Am. Rep. 745.

⁵ *Western Union Telegraph Company v. Rains*, 63 Tex. 27.

⁶ *State v. Daspit*, 30 La. Ann. 1112; *Bank of Hamburg v. Johnson*, 3 Rich. 42.

⁷ *Moffatt v. Parsons*, 5 Taunt. 307;

Manhattan Ins. Co. v. Le Pert, 52 Tex. 504.

⁸ *State Bank v. Cox*, 11 Rich. Eq. 344; 78 Am. Dec. 459.

⁹ *Mott v. Smith*, 16 Cal. 536.

¹⁰ *Meade v. Brothers*, 28 Wis. 689.

¹¹ *Pitsinowsky v. Beardsley*, 37 Iowa, 9; and see *Zaleski v. Clark*, 44 Conn. 318, 26 Am. Rep. 446, as to power to make condition that article may be returned if not satisfactory.

¹² *Boyett v. Braswell*, 72 N. C. 260.

contracts for the purchase of grain gives authority to modify or waive such contract.¹ Authority in a son to keep his father's books and accounts, and to compute the interest due on notes, does not show authority in the son to settle a note by agreeing to take a quantity of corn in full satisfaction.² An agent of an insurance company, to receive premiums and applications for insurance and transmit policies, has no authority to waive notice of an assignment of a policy.³ Where a general agent was authorized by an insurance company "to receive applications for insurance and reinsurance, to be submitted for approval," and he was "authorized to make applications binding until disapproval," it was held that an agreement made by him to extend a policy not disapproved was valid.⁴ A general authority to sell carries with it an authority to warrant,⁵ but a special authority to sell a particular thing does not.⁶

But there is no authority to warrant as to the future condition of the goods,⁷ nor to make an unusual warranty,⁸

¹ *Anderson v. Coonley*, 21 Wend. 279; *Owen v. Brockschmidt*, 54 Mo. 285.

² *Reynolds v. Ferree*, 86 Ill. 570.

³ *Tate v. Citizens' etc. Ins. Co.*, 13 Gray, 79.

⁴ *Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 357.

⁵ *Schuchardt v. Allen*, 1 Wall. 359; *Tice v. Gallup*, 2 Hun, 446; *Nelson v. Cowing*, 6 Hill, 337, overruling *Gibson v. Colt*, 7 Johns. 390; *Sandford v. Handy*, 23 Wend. 260; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Randall v. Kehlor*, 60 Me. 37; 11 Am. Rep. 169; *Gaines v. McKinley*, 1 Ala. 446; *Bradford v. Bush*, 10 Ala. 386; *Ezel v. Franklin*, 2 Sneed, 236; *Franklin v. Ezell*, 1 Sneed, 497; *Hunter v. Jameson*, 6 Ired. 252; *Boothby v. Scales*, 27 Wis. 626; *Woodford v. McClenahan*, 4 Gilm. 85; *Murray v. Brooks*, 41 Iowa, 45; *Fay v. Richmond*, 43 Vt. 25; *Palmer v. Hatch*, 46 Mo. 585; *Morris v. Bowen*, 52 N. H. 416; *Croom v. Shaw*, 1 Fla. 211; *Skinner v. Gunn*, 9 Port. 305; *Cocke v.*

Campbell, 13 Ala. 286; *Peters v. Farnsworth*, 15 Vt. 155; 40 Am. Dec. 671; *Taggart v. Stanbery*, 2 McLean, 543; *Andrews v. Kneeland*, 6 Cow. 354; *Ferguson v. Hamilton*, 35 Barb. 427; *Milburn v. Belloni*, 34 Barb. 607; *McCormick v. Kelly*, 28 Minn. 135. If it is the custom of the particular trade: *Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 877; *Scott v. McGrath*, 7 Barb. 53; *Lipscomb v. Kitrell*, 11 Humph. 256.

⁶ *Cooley v. Ferrine*, 41 N. J. L. 322; 32 Am. Rep. 210; *Brady v. Todd*, 9 Com. B., N. S., 592.

⁷ Illustrations: A was authorized by B to sell flour. *Held*, that A had no authority to warrant that the flour would keep sweet during a sea-voyage: *Upton v. Suffolk Mills*, 11 Cush. 586; 59 Am. Dec. 163. B's agent takes goods of C to sell on commission. He has no authority to guarantee the price they will bring: *Quinn v. Carr*, 6 Thomp. & C. 402; 4 Hun, 259.

⁸ *Palmer v. Hatch*, 46 Mo. 585.

nor to warrant goods not usually sold with a warranty.¹ A buyer who knows the kind of warranty which the agent is authorized to give cannot take from him an unauthorized warranty and hold the principal on it.² A power to sell land authorizes a conveyance with a general warranty.³ A general agent for the sale of safes has no authority to warrant them burglar-proof in the absence of a general custom, presumably known to buyer and seller, to do so.⁴ A power given by a seller of certain sacks of wool to a third person, to weigh the same and deliver them to the buyer, does not authorize the agent to make any warranty on the part of the seller as to the quality of the wool.⁵

ILLUSTRATIONS. — A made a warranty that whisky which he was authorized to sell by B would not be seized for a prior violation of the revenue laws. *Held*, not binding on B: *Palmer v. Hatch*, 46 Mo. 585. C wrote to his agent that he proposed to "place" his goods at a certain price. *Held*, that the agent had no authority to warrant that his principal would not sell for a less price: *Anderson v. Bruner*, 112 Mass. 14.

§ 75. **Carrier's Agents.**—A contract for the carriage of goods, made with an agent of the carrier, is the same as if made with the carrier himself.⁶ A general freight agent can bind the railroad company by a contract with a shipper to furnish a certain number of cars at a certain place on a certain day.⁷ The agents of an express company cannot bind their principal for goods received outside the office.⁸

¹ An agent employed to sell bank stock has no authority to warrant it: *Smith v. Tracy*, 36 N. Y. 79.

² *Wood Mowing and Reaping Machine Co. v. Crow*, 70 Iowa, 340.

³ *Vanda v. Hopkins*, 1 J. J. Marsh. 285; 19 Am. Dec. 92; *Peters v. Farnsworth*, 15 Vt. 155; 40 Am. Dec. 671. See *Bronson v. Coffin*, 118 Mass. 156.

⁴ *Herring v. Skaggs*, 73 Ala. 446; 34 Am. Rep. 4.

⁵ *Richmond Trading and Mfg. Co. v. Farquar*, 8 Blackf. 89.

⁶ *Mayall v. Boston etc. R. R. Co.*, 19 N. H. 122; *Reynolds v. Toppan*, 15 Mass. 370; 8 Am. Dec. 110; *Goodrich v. Thompson*, 4 Rob. 75; 44 N. Y. 324.

⁷ *Baker v. Kansas City, St. Joseph, etc. R. R. Co.*, 91 Mo. 152.

⁸ *Cronkite v. Wells*, 32 N. Y. 247.

§ 76. **Railroad Servants.**—A foreman porter, in charge of a station in the absence of the station-master, has no implied authority to give in charge a person whom he suspects of stealing the company's property;¹ a ticket clerk has no authority to do a similar thing;² the agents of a railroad have no authority to make contracts to carry beyond its route;³ a railroad yard-master has no authority to employ a surgeon for an employee injured by the cars;⁴ nor has a superintendent of a railroad,⁵ or a station-master,⁶ authority to employ a surgeon to attend an injured passenger or other person. A station agent has no authority to sign bills of lading for goods not received;⁷ but he has implied authority to contract to furnish a certain number of cattle-cars at his station on a certain day.⁸ A physician, in the employ of a railroad, with authority to buy medicines, has no implied power to contract for board, lodging, and nursing of a person injured by the cars.⁹ The surgeon of a railroad company has no implied authority to bind the company by an agreement to pay for services and meals furnished nurses and others in attendance upon an

¹ *Edwards v. London etc. R. R. Co.*, L. R. 5 Com. P. 445.

² *Allen v. London etc. R. R. Co.*, L. R. 6 Q. B. 65.

³ *Wait v. Railroad Co.*, 5 Lans. 475; *Burroughs v. Railroad Co.*, 100 Mass. 26; 1 Am. Rep. 78; *Grover Machine Co. v. Railroad Co.*, 70 Mo. 672; 35 Am. Rep. 444.

⁴ *Marquette R. R. Co. v. Taft*, 28 Mich. 289; *Cairo etc. R. R. Co. v. Mahoney*, 82 Ill. 73. In England a general manager has such authority: *Walker v. Railroad Co.*, L. R. 2 Ex. 228.

⁵ *Stephenson v. Railroad Co.*, 2 Duer, 341.

⁶ *Cox v. Railroad Co.*, 3 Ex. 268.

⁷ *Baltimore etc. R. R. Co. v. Wilkens*, 44 Md. 11; 22 Am. Rep. 26. But see *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; 22 Am. Rep. 603.

⁸ *Harrison v. Missouri Pacific R. R. Co.*, 74 Mo. 364; 41 Am. Rep. 318. "It may be safely affirmed," said the

court in this case, "that a station agent, clothed with the power and whose duty it is to receive and forward freight, who makes a contract within the scope of his apparent authority, thereby binds the company he represents, although in making such a contract he may have exceeded his authority; and when such company seeks to absolve itself from liability arising under such contract, on the ground that the agent, although apparently authorized to make it, in fact had no such authority, it must show that the party with whom the contract was made had knowledge of the fact that the agent was acting beyond his authority." To show that an agent of a railroad company settled for stock injured does not tend to show his authority to act in regard to the road-bed, ditches, or drainage: *Drake v. Chicago, Rock Island, etc., R. R. Co.*, 70 Iowa, 59.

⁹ *Maybery v. Chicago etc. R. R. Co.*, 75 Mo. 492.

employee injured by an accident on the road, and under the surgeon's treatment.¹ A station agent may bind the carrier by a contract beyond its legal duties and in conflict with its regulations; he may agree to carry to a place or at a time other than the rules of the company permit.² The agent of a railroad company for the sale of tickets has authority to make a contract with a passenger which is at variance with the printed conditions of the ticket;³ but in the absence of evidence, the presumption is, that a ticket agent at a way-station has no authority to change or modify contracts between the company and its through-passengers.⁴ But an agent employed for the sole purpose of soliciting passengers to patronize the road of the company, and who is not held out by the company as their agent for any other purpose, has no power to bind the company by a contract to receive freight from another road and transport it to the depot of, and ship it on, the road for which he is such agent.⁵ An engineer in the service of a railroad company has no power, without special authority, to bind the company by his contracts.⁷ Authority to an assistant superintendent to employ a station agent includes the authority to agree on his compensation.⁸ Where a manager of a railroad is authorized, in case of accident, to clear the road, he acts within the general scope of his authority in putting a lot of swine, let loose by an accident, into a farmer's yard.⁹

¹ *Bushnell v. Chicago and Northwestern R'y Co.*, 69 Iowa, 620.

² *Pickford v. Railroad Co.*, 12 Mees. & W. 766; *Wilson v. Railroad Co.*, 18 Eng. L. & Eq. 557; *Strohn v. Detroit etc. R. R. Co.*, 23 Wis. 126; *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455; *Lackawanna R. R. Co. v. Chenevith*, 52 Pa. St. 382; 91 Am. Dec. 168.

³ *Burnham v. Grand Trunk R. R. Co.*, 63 Me. 298; 18 Am. Rep. 220.

⁴ *McClure v. Philadelphia etc. R. Co.*, 34 Md. 532; 6 Am. Rep. 345.

⁵ *Taylor v. Chicago etc. R. R. Co.*, 74 Ill. 86.

⁷ *Gardner v. Boston and Maine R. Co.*, 70 Me. 181.

⁸ *Alabama Great Southern R. R. Co. v. Hill*, 76 Ala. 303.

⁹ *Hawks v. Locke*, 139 Mass. 205; 52 Am. Rep. 702.

3. DUTIES AND LIABILITIES ARISING OUT OF THE CONTRACT OF AGENCY.

CHAPTER IX.

DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL.

- § 77. Duties of agent.
- § 78. To act as agent.
- § 79. To perform duties in person.
- § 80. To give notice to principal.
- § 81. To obey instructions and orders — When excused.
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- § 83. To use reasonable skill and diligence.
- § 84. Deputies.
- § 85. Profits belong to principal.
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- § 89. To keep accounts.
- § 90. Cannot dispute principal's title.
- § 91. Mixing property.
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- § 93. Purchasing and selling property.
- § 94. Agent of both parties.

§ 77. **Duties of Agents.**—There are certain duties which the agent owes to his principal, and which the principal has a right to expect of his agent. For a violation of such duties the agent is responsible for all the damages which are the natural result thereof.¹ And an agent who has become responsible to his principal for the misconduct of his own subagent may recover from such subagent what he has been compelled to pay the principal.²

¹ *Wits v. Morrill*, 66 Barb. 511; *Wade*, 58 Tenn. 480; *Dodge v. Tillotson*, 12 Pick. 328.
² *Pownall v. Bair*, 78 Pa. St. 403.

§ 78. **To Act as Agent.**—A paid agent must perform the duties of his office, and if he neglects to enter upon the performance of what he has undertaken to do, he will be liable to the principal.¹ A gratuitous agent is not liable for refusing to undertake or for the duties of the agency;² but once undertaken, he is liable for disregarding instructions whereby a loss occurs to the principal.³ If it is the usage of a place that a mercentile agency should be executed in a particular way, the parties who authorize and agree to exercise this agency impliedly

¹ Evans on Agency, 309.

² Evans on Agency, 325; *Elsee v. Galward*, 5 Term Rep. 143; *Balfie v. West*, 13 Com. B. 466. In *Morrison v. Orr*, 3 Stew. & P. 49, 23 Am. Dec. 319, it was held that the non-feasance of a gratuitous undertaking created no liability. In this case Orr placed in the hands of Morrison the exemplification of a judgment rendered against a third person, for which Morrison gave a receipt, in which it was said: "I am to endeavor to collect said amount and pay it over to said Orr." Morrison failed to do anything, and was sued for damages. The judge instructed the jury that they were bound to infer, in the absence of any evidence on the subject, that Morrison was to receive compensation for his agency, and that he was therefore bound to greater diligence than he had exercised, and was liable. On appeal this was held erroneous. "If," said the court, "Morrison had been an attorney, whose business and employment was the collection of debts, there is no doubt that the inference drawn by the judge would have been correct. If one receives business within the line of his profession or occupation, and promises attention to it, — or if he does not make an express promise, one would be implied, — the law would create a presumption that he was to receive the ordinary compensation, although not a word had been said about compensation. But it seems to me that the presumption rests entirely on the ground that it is in the proper line of the business of the person so under-

taking it; and, if not accustomed to such agencies for hire, that the law, so far from presuming that a compensation was to be received, would infer that it was a mere naked agency, or mandatory, in which compensation is not an ingredient in the undertaking. It is one of those friendly offices that, in our relations with society, daily occur, without either party ever thinking of compensation. This distinction is recognized by Chief Justice Kent in *Thorne v. Deas*, 4 Johns. 84. If, then, it was a voluntary and gratuitous agency, without reward, the agent was not liable for a non-feasance; he might perform his undertaking or not, as suited his convenience. It is true, by the civil law, he would be liable to the mandator for all damages that ensued from his failure to perform his promise; but quite a different rule prevails at common law. By the latter such contracts are held to be of imperfect obligation, and not to be enforced at law for want of a sufficient consideration. In a case where one joint owner of a ship promised the other joint owner to have an insurance effected, and failed to do so, on the ship being lost, a suit was brought, and the promise was held to be *nudum pactum*. *Thorne v. Deas*, 4 Johns. 84. It should, at any rate, have been matter of proofs before the jury, whether Morrison was to receive compensation or not."

³ *Williams v. Higgins*, 30 Md. 404; *Benden v. Manning*, 2 N. H. 289; *Pasano v. Acosta*, 4 La. 26; 23 Am. Dec. 470.

incorporate this usage into their contract.¹ "Whatever acts are usually done by such classes of agents, whatever rights are usually exercised by them, and whatever duties are usually attached to them, all such acts, rights, and duties are deemed to be incidents of the authority conferred to them in their particular business, employment, or character. These, indeed, are in some cases so well known and so well defined in the common negotiations of commerce, and by the frequent recognition of courts of justice, as to become matters of legal intendment and inference, and not to be open for inquiry or controversy. In other cases, indeed, they may be fairly open as matters of fact, to be established by suitable proofs."²

§ 79. To Perform his Duty in Person.—An agent, as we have seen,³ cannot delegate his authority to another. But one who has reason to expect the arrival of a draft at his office for the benefit of his principal is bound, if he leaves the office for several days together, to leave authority with some one to open letters, and present the draft in case of its arrival during his absence.⁴

§ 80. To Give Notice to Principal.—It is the duty of an agent to give his principal notice of every fact which it is to the interest of the principal to know for his guid-

¹ Lawson on Usages and Customs, sec. 142; Wharton on Agency, sec. 134; Young v. Cole, 3 Bing. N. C. 724; Sutton v. Tatham, 10 Ad. & E. 27; Bayliffe v. Butterworth, 1 Ex. 445; Graves v. Legg, 2 Hurl. & N. 210; Pickering v. Buck, 15 East, 38; Brady v. Todd, 9 Com. B., N. S., 592; Frank v. Jenkins, 22 Ohio St. 577; Schuchardt v. Allen, 1 Wall. 359; Greely v. Bartlett, 1 Greenl. 172; 10 Am. Dec. 54; Randall v. Kehlor, 60 Me. 37; 11 Am. Rep. 169; Goodenow v. Tyler, 7 Mass. 36; 5 Am. Dec. 22; Upton v. Suffolk Mills, 11 Cush. 586; 59 Am. Dec. 163; Day v. Holmes, 103 Mass. 306; Willard v. Buckingham, 36 Conn. 395; Daylight-Burner Gas Co. v. Odlin, 51 N. H. 56; McKinstry v. Pearsall, 3 Johns. 319; Smith v. Tracy, 36 N. Y. 79; Rosenstock v. Tormey, 32 Md. 169; 3 Am. Rep. 125; American Central Insurance Co. v. McLanathan, 11 Kan. 533. And see Russell v. Hankey, 6 Term Rep. 12; Belcher v. Parsons, Amb. 219; Caffrey v. Darby, 6 Vcs. 496; Massey v. Banner, 1 Jacob & W. 241.

² Story on Agency, sec. 106.

³ Ante, Chapter V., Delegation of Authority.

⁴ Brady v. Little Miami R. R. Co., 34 Barb. 249.

ance,¹ and to notify him immediately of his receipt of money.² The knowledge of an agent in the course of his agency is the knowledge of the principal.³ And so is knowledge acquired by him while not acting as agent, if he had it in mind when he was afterwards acting for his principal.⁴

§ 81. **To Obey his Instructions and Orders.**—An agent must follow strictly the instructions and orders of his principal, and will be liable for not doing so.⁵ A disregard of instructions cannot be excused on the ground of usage.⁶ If the agent disobeys his orders he is liable to the principal, even though he acts in good faith,⁷ or his deviation was advantageous to the principal,⁸ or he intended to benefit his principal.⁹ And if, in violating his instructions, he obtains a profit, it belongs to the principal.¹⁰ A violation by an agent of the positive instructions of his principal is gross negligence, and renders him liable

¹ *Clark v. Bank of Wheeling*, 17 Pa. St. 324; *Moore v. Thompson*, 9 Phila. 164; *Brown v. Arrott*, 6 Watts & S. 416; *Forrestier v. Bordman*, 1 Story, 44; *Dodge v. Perkins*, 9 Pick. 368; and see *Callar v. Ford*, 45 Iowa, 331.

² *Lyle v. Murray*, 4 Sand. 590; *McMahan v. Franklin*, 38 Mo. 548.

³ *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543.

⁴ *Wilson v. Minn. etc. Ins. Co.*, 36 Minn. 112; 1 Am. St. Rep. 659; and see *post*, Division 4, Notice.

⁵ *Clark v. Roberts*, 26 Mich. 506; *Wilson v. Wilson*, 26 Pa. St. 393; *Folansbee v. Parker*, 70 Ill. 11; *Smith v. Lascelles*, 2 Term Rep. 187; *Park v. Hammond*, 4 Camp. 344; *Scott v. Rogers*, 31 N. Y. 676; *Courcier v. Ritter*, 4 Wash. C. C. 551; *Hall v. Storrs*, 7 Wis. 253; *Williams v. Higgins*, 30 Md. 404; *Brown v. McGran*, 14 Pet. 479; *Blot v. Boiceau*, 3 N. Y. 78; 51 Am. Dec. 345; 1 Sand. 111; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Rundle v. Moore*, 3 Johns. Cas. 36; *Marfield v. Douglass*, 1 Sand. 361; *Johnson v. Railroad Co.*, 31 Barb. 198; *Ure v. Curell*, 16 Mart. 502; *Wilts v. Morrell*,

66 Barb. 511; *Robinson Machine Co. v. Vorse*, 52 Iowa, 207; *Stearine etc. Co. v. Heintzman*, 17 Conn. B., N. S., 56; *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168; *Szymanski v. Plasan*, 20 La. Ann. 90; 96 Am. Dec. 382.

⁶ *Lawson on Usages and Customs*, sec. 153; *Day v. Holmes*, 103 Mass. 306; *Cropper v. Cook*, L. R. 3 Com. P. 194; *Pickering v. Demeritt*, 100 Mass. 406; *Rosenstock v. Tormey*, 32 Md. 169; *Parsons v. Martin*, 11 Gray, 112; *Strong v. Bliss*, 6 Met. 393; *Barksdale v. Brown*, 1 Nott & McC. 517; 9 Am. Dec. 720; *Hall v. Storrs*, 7 Wis. 253.

⁷ *Lavery v. Snethen*, 68 N. Y. 522; 23 Am. Rep. 184; *Bank of Owensboro v. Western Bank*, 13 Bush, 526; 26 Am. Rep. 211; *Williams v. Littlefield*, 12 Wend. 362. See *Price v. Keyes*, 62 N. Y. 378.

⁸ *McDermid v. Cotton*, 2 Bradw. 297; *Shipherd v. Field*, 70 Ill. 438.

⁹ *Scott v. Rogers*, 31 N. Y. 676; *Evans v. Root*, 7 N. Y. 186; 57 Am. Dec. 512; *Rechtscherd v. Bank*, 47 Mo. 181.

¹⁰ *Story on Agency*, sec. 192.

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for such loss or damage as may result from it, and in such case every doubtful circumstance is construed against him.¹ But he is not obliged to perform an immoral or an illegal act, even though required by the principal.² But an agent sued by his principal for profits or money paid to him cannot set up that the transaction was illegal.³ A deviation from or failure to carry out his orders, caused by necessity or an extraordinary emergency, will be justifiable.⁴ The acceptance of bills by an agent, to avoid the suspension of work of great importance to the principal, does not fall within that class of cases of extraordinary emergency or overruling necessity in which, from the very necessities of the case, an agent is justified in deviating from the authority conferred on him.⁵ And an agent will not be responsible for not following strictly the instructions of the principal where such instructions are ambiguous or doubtful as to their meaning.⁶ If a principal gives his agent instructions capable of two constructions, the agent is protected if he acts in good faith on either.⁷ One who is authorized to draw drafts on another "at ten or twelve days," with nothing to indicate whether ten or twelve days after date or after sight is meant, may exercise his own discretion, and con-

¹ Adams v. Robinson, 65 Ala. 586.

² Evans on Agency, 293; Story on Agency, sec. 195; Wharton on Agency, sec. 249; Le Guen v. Gouverneur, 1 Johns. Cas. 436; 1 Am. Dec. 121; Curran v. Downs, 7 Mo. 329; Cannan v. Bryce, 3 Barn. & Ald. 179; Webster v. De Tastet, 7 Term Rep. 157; Armstrong v. Toller, 11 Wheat. 258.

³ Pointer v. Smith, 7 Heisk. 137; Brooks v. Martin, 2 Wall. 70; Baldwin v. Potter, 46 Vt. 402; Murray v. Vanderbilt, 39 Barb. 140; Daniels v. Barney, 22 Ind. 207; Mayor v. Draper, 23 Barb. 425.

⁴ Jervis v. Hoyt, 2 Hun, 637; Catlin v. Bell, 4 Camp. 183; Greenleaf v. Moody, 13 Allen, 363; Liotard v. Graves, 3 Caines, 226; Duser v. Perit, 4 Binn. 361; Williams v. Shackleford, 16 Ala. 318; Forrestier v. Bordman,

1 Story, 43; Gould v. Rich, 7 Met. 556; Lawler v. Keaquick, 1 Johns. Cas. 175; Judson v. Sturges, 5 Day, 556; Wharton on Agency, sec. 388; Bernard v. Maury, 20 Gratt. 434; Weakley v. Pearce, 5 Heisk. 401; Shaw v. Stone, 1 Cush. 228.

⁵ Sewanee Mining Co. v. McCall, 3 Head, 619.

⁶ De Tastet v. Cronisallat, 2 Wash. C. C. 132; Marsh v. Whitmore, 21 Wall. 178; Vianna v. Barclay, 3 Cow. 281; Jervis v. Hoyt, 2 Hun, 637; Foster v. Rockwell, 104 Mass. 167; Besant v. Harris, 63 N. C. 542; Long v. Pool, 68 N. C. 479; Ireland v. Livingston, L. R. 5 H. L. Cas. 395; Mechanics' Bank v. Merchants' Bank, 6 Met. 13.

⁷ Minnesota Linseed Oil v. Montague, 65 Iowa, 67.

sult his own convenience in that particular.¹ And so a slight and unimportant deviation from his instructions will not render the agent liable to the principal.²

ILLUSTRATIONS.—W. gave a draft to an express company to collect, with instructions to return it at once if not paid. On their presenting it to the drawee, he asked them to wait until he had received certain explanations from W., which they agreed to do. Afterwards, and before the draft was again presented to him, the drawee became insolvent. *Held*, that the company was responsible for the loss: *Whitney v. Merchants' Express Co.*, 104 Mass. 152; 6 Am. Rep. 207.³ A principal directed his agent to remit him three hundred dollars in bills of fifty dollars or one hundred dollars each; the agent sent the amount in bills of five dollars, ten dollars, and twenty dollars. The sum was lost or stolen *in transitu*. *Held*, that the agent was liable: *Wilson v. Wilson*, 26 Pa. St. 393.⁴ An owner directed his agent to

¹ *Barney v. Newcomb*, 9 Cush. 46.

² *Evans on Agency*, 309.

³ "It is the first duty of an agent," said the court, "whose authority is limited, to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses which are the natural consequences of his act": *Whitney v. Merchants' Exchange Co.*, 104 Mass. 152; 6 Am. Rep. 207.

⁴ "The primary obligation of an agent," said the court in this case, "whose authority is limited by instructions, is to adhere faithfully to those instructions in all cases to which they ought properly to apply: *Story on Agency*, sec. 192. He is in general bound to obey the orders of his principal *exactly*, if they be imperative, and not discretionary; and, in order to make it the duty of a factor to obey an order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order: *Story on Contracts*, sec. 359; *Brown v. McGran*, 14 Pet. 494. It is true that instructions may be disregarded in cases of extreme necessity, arising from unforeseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals: *Story on Agency*, sec. 194. These are, however, excep-

tional cases. There may, perhaps, be others which have been sanctioned by adjudications, founded on the principle that the departure complained of was not material. But the general rule is as indicated in what has been said, and the case before the court was not brought within any of the exceptions. To justify a departure from instructions, where a loss has resulted from such deviation, the case must be brought within some of the recognized exceptions. It is not sufficient that the deviation was not material, if it appear that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present; but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff. To force a man to perform an executory contract after substituting for the consideration other terms than those provided for in the bargain is to deprive him of the right to manage his own business in his own way. To do this on the ground that the departure is not material, when it is manifest that the party considered it otherwise, is a violation of private right, which leads to uncertainty and litigation without necessity or excuse. In *Nesbit v. Burry*, 25 Pa. St. 210, this court refused to com-

procure insurance on a vessel to sail as soon as certain frigates, "calculating to take advantage of their protection." She sailed without them, and was captured. *Held*, that the agent was not liable for not having effected insurance, as it would have been of no avail: *Alsop v. Coit*, 12 Mass. 40. An agent appointed by creditors to settle certain claims received from the debtor promissory notes, which before maturity he sold for less than the face thereof, without informing his principals. On being called upon to account, he denied that he had received anything on the notes for which he was liable to account. *Held*, that the sale was without authority, and the principals could recover from the agent the full amount of the notes: *Allen v. Brown*, 44 N. Y. 228; affirming 57 Barb. 86. An owner instructed his agent in Liverpool to hold flour until an expected act of Parliament had produced its effect upon the market, and then to sell. *Held*, that it was left to the agent's judgment to determine when the effect was produced, and that he was not liable for an error in judgment, if he acted in good faith and with reasonable prudence: *Milbank v. Dennistoun*, 21 N. Y. 386. The principal instructed his agent to buy goods, and draw upon W., his banker, having funds, for thirty and sixty days, for the price. The agent drew at four months, and about three weeks before the bill fell due the banker failed. *Held*, that the principal was not bound to take up the bill, as against the agent: *Potter v. Everett*, 2 Hall, 252. An agent, having received money of the principal, was directed to remit it by purchasing a bill of exchange. He purchased the bill upon his own credit, using the funds of his principal as his

pel a man to give up his oxen, although he had sold them and received part of the purchase-money, because it was a part of the contract that they were sold by weight, and the weight was to be ascertained by 'the scales at Mount Jackson.' The scales designated were so out of repair that the weight could not be ascertained by them, and it was held that no others could be substituted against his consent, so as to divest his right of property. Whether an action for damages could have been sustained was not the question there; nor is it the question here. As between vendor and vendee, the right of property, and the consequent risk, vests on delivery of the goods purchased by the designated carrier, packed, and directed according to usage or instructions. But if a different method of packing and directing, or a different carrier than the one designated, be

adopted by the vendor, he assumes the risk in case of loss, unless it be shown that his deviation in no way contributed to the loss. Where the goods are stolen, how can this be shown? In sending bank notes by mail, it is manifest that while a large package would attract the attention and care of honest agents on the route, it might tempt the cupidity of dishonest ones. The party who proposes to take the risk of this method of remittance has a right to weigh the advantages and disadvantages of the various methods of inclosing the notes; and if he directs the money to be remitted in notes of one hundred dollars or fifty dollars, the debtor has no right to increase the size of the package by remitting in notes of ten dollars and five dollars. There was error in permitting the jury to find that the departure from instructions was immaterial."

own. *Held*, that such a purchase was not authorized; that the agent remained liable for the money: *Stone v. Hayes*, 3 Denio, 575. An agent to buy and ship wheat to Nashville shipped a quantity to Sanders's Ferry, on the Cumberland River. The boat containing it sank when near its destination, and the agent sold the wheat to the carrier. *Held*, that the emergency did not authorize this. *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604. An agent was directed to forward a claim to a certain person for collection, but forwarded it to another. *Held*, liable for any loss resulting thereby: *Butts v. Phelps*, 79 Mo. 302. A principal authorized his agent to sell, on condition that payment was secured by paper "unquestionably good." The purchasers were notoriously insolvent, and their notes were not collectible. *Held*, that the principal had a valid claim against the estate of his agent, who had died intestate: *Robinson Machine Works v. Vorse*, 52 Iowa, 207. An agent employed to subscribe for stock in a railroad company for his principal, and in his principal's name, subscribed and paid calls in his own name, and afterwards procured a certificate, and tendered a transfer to the principal, who refused to take and pay for them. *Held*, that the agent could not recover. He should have subscribed in the principal's name: *Shrack v. McKnight*, 84 Pa. St. 26. Plaintiff employed defendant to take two horses to Richmond, Virginia, to exhibit at the fair, and to sell for the best price he could get, for which he was to be paid for his services and traveling expenses. He sold one horse, but was unable to sell the other. He then received a letter from plaintiff, directing him to see some men in Petersburg, who might direct him to a purchaser. He went there, saw them, but effected no sale. He then, without instructions, but in good faith, took the horse to various places in North and South Carolina. In the latter he finally sold him, but not until his expenses had amounted to a considerable sum. *Held*, that the agent, after he left Petersburg, exceeded his instructions, and was not entitled to pay or traveling expenses after that time: *Fuller v. Ellis*, 39 Vt. 345; 94 Am. Dec. 327.

§ 82. To Act in Good Faith and in Interest of Principal.—The agent's position being one of trust, he must act in good faith and to the principal's interest.¹ The relations between an attorney in fact, who undertakes to care for and protect the land of his principal, and negotiate sales of the same, and the principal, are of a fiduciary nature, and the agent must not put himself, during his

¹ *Holladay v. Davis*, 5 Or. 49.

agency, in a position which is adverse to that of the principal.¹ If one acts as agent of another, and uses his money in making a purchase of land at sheriff's sale, but buys in his own name, the interest he acquires by the purchase vests in equity in his principal.²

ILLUSTRATIONS.—A was indebted upon a note and mortgage to B, in the sum of forty thousand dollars. B assigned the note and mortgage to C, and received from him his notes in lieu thereof. Afterwards A mortgaged to C, together with other property, the property previously mortgaged to B, subject to first mortgage, for which C was to advance to A, from time to time, sums of money, not to exceed twelve thousand dollars, to enable A to pay his debts. By this mortgage C was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the twelve thousand dollars and interest, and in case the rents should not be sufficient for that purpose, and A should not pay within two months after request, then C was to sell, and out of the proceeds to pay the amount and interest so advanced. C at various times advanced to A nearly twelve thousand dollars, and collected rents to the amount of twenty-eight thousand dollars. Subsequently C died, and then his executor collected the rents. *Held*, in an action by A against C's administrator, that C acted in the purchase of the note and mortgage of B as an agent of A, and that A was entitled to the trust fund: *Gunter v. Jones*, 9 Cal. 643. In an action to foreclose a mortgage where K. defended as a subsequent purchaser of the mortgaged property, the lower court having found as a fact that K. was the agent of plaintiff, and acted as such in procuring the note and mortgage, and receiving interest upon the note, but without stating more particularly the duties devolving upon him as agent, the appellate court refused to infer from this that his duties as agent were of a character which prevented him from contracting in relation to the property on which the debt was secured: *McCarthy v. White*, 21 Cal. 495.

§ 83. To Use Reasonable Skill and Diligence.—The agent in the execution of the principal's orders must use reasonable skill and diligence, and will be liable to him for the consequences of his negligence.³ By reasonable

¹ *Rubidoex v. Parks*, 48 Cal. 215.

² *Green v. Clark*, 31 Cal. 591; see *post*, Division 4, Trustees.

³ *Myles v. Myles*, 6 Bush, 237; *Red-*

field v. Davis, 6 Conn. 442; *Leverick v. Meigs*, 1 Cow. 645; *Shiells v. Blackburne*, 1 H. Black. 158; *Moore v. Gholson*, 34 Miss. 372.

skill and diligence is meant that ordinarily possessed by persons in the same trade or business, and generally used by persons of common capacity in their own affairs.¹ And an agent will never be permitted to profit by his negligence towards his principal.² But for mere errors of judgment the agent is not responsible.³ In a leading English case it is laid down that if A, a general merchant, undertakes voluntarily, without reward, to enter a parcel of goods for B, together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized, A having taken the same care of the goods of B as of his own, not having received any reward, and not being of a profession or an employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to B.⁴ Where one sends money to a commission merchant with which to buy wheat, telling him to buy sound wheat, if the agent exercises reasonable care and skill he is not liable if the wheat is damp.⁵

ILLUSTRATIONS. — On the 30th of March, an agent to sell for cash took a promissory note in part payment, when he might have had cash, and on the 28th of May, in answer to a demand for the proceeds, said he knew nothing of the matter. *Held*, that the jury were warranted in finding an unreasonable delay to settle, although the note had not then been paid: *Hemenway v. Hemenway*, 5 Pick. 389. A master of a ship, with orders to sell the cargo at a foreign port, *held* not liable for leaving it there with a merchant for sale, he not having been able to effect a sale himself: *Day v. Noble*, 2 Pick. 615; 13 Am. Dec. 463.

¹ *Chapman v. Walton*, 10 Bing. 57; *Howard v. Grover*, 28 Me. 97; *McCandless v. McWha*, 22 Pa. St. 261. A principal who knowingly employs an incompetent agent cannot be heard to complain: *Wakeman v. Hazleton*, 3 Barb. Ch. 148.

² *Mitchell v. Aten*, 37 Kan. 33; 1 Am. St. Rep. 231.

³ *Page v. Wells*, 37 Mich. 415; *Get-*

tins v. Scudder, 71 Ill. 86, to the effect that an agent to insure is not a guarantor of the solvency of the companies in which he places the insurance.

⁴ *Shiells v. Blackburne*, 1 H. Black. 158.

⁵ *Lake City Flouring Mill Co. v. McVean*, 32 Minn. 301.

§ 84. **Deputies.**—An agent who has authority to appoint deputies is liable for negligence in appointing them, but not for their negligent acts.¹ An agent is liable to his principal for the neglect of a subagent employed by the agent, with the principal's knowledge, but upon the agent's account.²

§ 85. **Profits Belong to Principal.**—All profits directly or indirectly made by an agent in the course of or in connection with his employment, whether in performance of or in violation of his duty, belong to the principal.³ Where an agent acts for an agreed salary, or where there is no express contract in reference to his compensation, he will not be allowed to retain profits incidentally obtained in the execution of his duty, any usage to the contrary notwithstanding; and all profits and advantages over and above the agent's ordinary compensation belong to the principal.⁴ So a trustee or guardian who speculates with trust funds is liable for the profits made by him.⁵ There is nothing, however, to prevent both parties from agreeing that the benefit of certain profits shall belong to the agent,⁶ or the principal may ratify the agent's conduct.⁷

¹ Warren Bank v. Suffolk Bank, 10 Cush. 585; Campbell v. Reeves, 3 Head, 226; Bath v. Caton, 37 Mich. 199; Tiernan v. Commercial Bank, 7 How. (Miss.) 648; 40 Am. Dec. 83; Commercial Bank v. Martin, 1 La. Ann. 344; 45 Am. Dec. 87. But see Morgan v. Tener, 83 Pa. St. 305.

² Barnard v. Coffin, 141 Mass. 37; 55 Am. Rep. 443.

³ Evans on Agency, 333; Bain v. Brown, 56 N. Y. 285; Dutton v. Willner, 52 N. Y. 312; Brown v. Post, 1 Hun, 303; Dodd v. Wakeman, 26 N. J. Eq. 414; Campbell v. Ins. Co., 2 Whart. 64; Bartholemew v. Leech, 7 Watts, 472; Norris's Appeal, 71 Pa. St. 106; Coursin's Appeal, 79 Pa. St. 220; Lafferty v. Jelley, 22 Ind. 471; Ackenburgh v. McCool, 36 Ind. 473; Barton v. Moss, 32 Ill. 50; Mason v. Bauman, 62 Ill. 76; Ely v. Hanford, 65 Ill. 267; Stoner v. Weiser, 24 Iowa, 434;

Jeffries v. Wiester, 2 Saw. 135; Oliver v. Piatt, 3 How. 323; Judevine v. Hardwick, 49 Vt. 180; Leake v. Sutherland, 25 Ark. 219; Clark v. Anderson, 10 Bush, 99; Krutz v. Fisher, 8 Kan. 90; Moinett v. Day, 1 Baxt. 431; Bell v. Bell, 3 W. Va. 183; Morrison v. Thompson, L. R. 9 Q. B. 483; Barber v. Dennis, 6 Mod. 69; Diplock v. Blackburn, 3 Camp. 43; Wiley's Appeal, 8 Watts & S. 244; Marvin v. Buchanan, 62 Barb. 468; White v. Ward, 26 Ark. 445; Rhea v. Puryear, 26 Ark. 344.

⁴ Jacques v. Edgell, 40 Mo. 76.

⁵ Norris's Appeal, 71 Pa. St. 106; Bond v. Lockwood, 33 Ill. 212; see Division 3, Trustees.

⁶ Anderson v. Weiser, 24 Iowa, 428.

⁷ Great Western Ins. Co. v. Cunniffe, L. R. 9 Ch. 525; Redfield v. Tegg, 38 N. Y. 212.

ILLUSTRATIONS. — An agent is employed to sell property at a certain price. He sells for a greater price. He must account to the principal for the excess: *Kerfoot v. Hyman*, 52 Ill. 512; *Merryman v. David*, 31 Ill. 403. (But he is not liable to the purchaser: *Id.*) An apprentice was impressed by the government as a sailor and earned certain money. *Held*, that it belonged to the master: *Barber v. Dennis*, 6 Mod. 69. A gave B \$80 to buy him a horse, for which service B was to receive \$1. B obtained the horse for \$72.50. *Held*, that A was entitled to recover from B the sum of \$6.50: *Bunker v. Miles*, 30 Me. 431; 50 Am. Dec. 632.¹ A employed a broker to purchase a particular ship on the basis of an offer of £9,000, or as cheaply as he could. The ship was purchased for £9,250. Prior to the sale, the vendor had arranged with B that if B could sell the ship for more than £8,500 he might retain the excess, and B had agreed with the broker, without the knowledge of A, that if the sale was consummated, the broker should receive part of the excess over £8,500. After the sale, £225 was paid by B to the broker. *Held*, that A was entitled to recover this sum from the broker: *Morrison v. Thompson*, L. R. 9 Q. B. 480.² R. employed W. to compromise with his creditors, and authorized him to offer fifty cents on the dollar. W., while acting as such agent, purchased several notes of R. at that rate, upon his own account, and afterwards sold such notes to J. for the whole nominal amount, after they became due. *Held*, that J. could not be permitted to recover more than fifty per cent upon the amount of such notes: *Reed v. Warner*, 5 Paige, 650. A special agent of a company preserved copies of his correspondence with the general agent. *Held*, that they belonged to the agent instead of the company: *Evans v. Van Hall*, 1 Clarke Ch. 22.

§ 86. **Losses must be Borne by Principal.**—And as to the principal belong the gains, so it is the principal that must bear the losses which may occur in the course of the agency.³

¹ "If the defendant made a valid contract with the plaintiff to do the service requested as an agent, and did do it as was agreed, he was not at liberty to make a profit to himself in the transaction in which he was acting as the agent; and whatever sum remained in his hands after paying the price of the horse, deducting the compensation to be made to him, was the money of the plaintiff, for which the equitable action of money had and received could be maintained": *Bunker v. Miles*, 30 Me. 431; 50 Am. Dec. 632.

² "Indeed," said Cockburn, C. J., "it may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers,"—indorsing this statement of the law in *Story on Agency*, sec. 211; *Morrison v. Thompson*, L. R. 9 Q. B. Cas. 480.

³ *D'Arcy v. Lyle*, 5 Binn. 441; *Richardson v. Futrell*, 42 Miss. 525.

§ 87. Keeping and Deposit of Money by Agent—Mode.

—If an agent deposit his principal's money in a bank or other depository, using reasonable prudence and care in its selection, he will not be responsible for the loss of the money caused by its becoming insolvent.¹

§ 88. Remittances by Agent—Mode.—

If an agent remits money according to the orders or usage of the principal, he will not be liable if it is lost in transit. If the agent is instructed to "forward" money, he discharges his duty by sending it in a letter, by mail, and if it is lost, the loss is the principal's.² An agent to collect money is bound to immediate payment.³ On the other hand, if the agent remits money in an unauthorized mode, the risk is his.⁴

ILLUSTRATIONS.—A authorized B to transmit a sum of money to him, as he, B, might think best. B sent the money by mail, and it was taken from the post-office, and appropriated to his own use, by a person authorized by A to take his letters from the office. *Held*, that A must, as agent of B, suffer the loss: *Lamb v. Trogden*, 2 Dev. & B. Eq. 190. Defendants were directed to place certain money to plaintiff's credit in the Exchange Bank of Denver, and in order to comply, were obliged to transmit the money from Kansas City, Missouri, to Denver. *Held*, that defendants had the right to transmit the money by some usual and ordinary method recognized among business men as proper for that purpose; and where there were several methods of transmitting money between those points, equally used by business men, and safe and economical, they might choose either: *Earnest v. Stoller*, 2 McCrary, 380. A local railroad agent was instructed to remit daily to the headquarters of the company all sums of money received over ten dollars. *Held*, that he would be allowed a reasonable time, in view of his other duties, to make the remittance, and was not liable for money stolen from him which he did not receive in time to remit as instructed: *Robinson v. Illinois etc. R. R. Co.*, 30 Iowa, 401.

¹ *Knight v. Plymouth*, 3 Atk. 480; *Rawls*, 21 Ga. 289; *Lyle v. Murray*, 4 Hammon v. Cottle, 6 Serg. & R. 290. Sand. 590.

² *Buell v. Chapin*, 99 Mass. 594; 97 Am. Dec. 58.

³ *Merchants' Bank of Macon v. Sickles*, 17 Ark. 428; 65 Am. Dec. 437.

⁴ *Ferris v. Paris*, 10 Johns. 285; *Kerr v. Catton*, 23 Tex. 411; *Burr v.*

§ 89. **To Keep Accounts—Account for Money.**—So it is the duty of the agent to keep regular accounts,¹ and to account to his principal for money received, goods sold, and orders obtained,² and even though such sales, as between the principal and the purchaser, are illegal.³ An agent cannot keep money of his principal on the plea that it was given him for an unlawful purpose.⁴ Gross mismanagement by a financial agent, consisting of failure to keep accounts and vouchers, is a defense to his action for salary.⁵ Money deposited in bank by an agent as an ordinary deposit, the agent stating that it was his principal's money, but desiring the officer to place it to his credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, may be followed in a court of equity by the principal.⁶ A demand by the principal on the agent for moneys received by him is necessary before bringing suit,⁷ unless so long a time has elapsed since the collection as to raise the presumption that the agent has appropriated the money to his own use,⁸ or unless he has refused or neglected to render an account,⁹ or denies the agency;¹⁰ or where a claim is set up exceeding the amount collected, or where the agent in his answer disputes his liability.¹¹ An agent is liable to the principal for interest on money in his hands, where he

¹ *White v. Lincoln*, 8 Ves. 363; *Wharton on Agency*, sec. 299.

² *Evans on Agency*, 339.

³ *Baldwin v. Potter*, 46 Vt. 402.

⁴ *Souhegan Bank v. Wallace*, 61 N. H. 24.

⁵ *Smith v. Crews*, 2 Mo. App. 269.

⁶ *Whitley v. Foy*, 6 Jones Eq. 34; 78 Am. Dec. 236.

⁷ *Bedell v. Janney*, 4 Gilm. 193; *Heddeus v. Younglove*, 46 Ind. 212; *Whitehead v. Wells*, 29 Ark. 99; *Haas v. Damon*, 9 Iowa, 589; *Armstrong v. Smith*, 3 Blackf. 251; *Jett v. Hempstead*, 25 Ark. 462; *Walrath v. Thompson*, 6 Hill, 450; *Judah v. Dyott*, 3 Blackf. 324; 25 Am. Dec. 113; *Baird v. Walker*, 12 Barb. 331; *Walden v. Crafts*, 2 Abb. Pr. 304; *Colvin v. Holbrook*, 2 N. Y. 130; *Taylor v. Spears*,

1 Ark. 381; 44 Am. Dec. 519; *Switzer v. Skiles*, 3 Gilm. 520; 44 Am. Dec. 723; but see *Leake v. Sutherland*, 25 Ark. 210. A mere collecting agent is liable for money collected and not paid over without any previous demand; *Little v. Hoyt*, 5 Hill, 395; 40 Am. Dec. 360; *Hickok v. Hickok*, 13 Barb. 633; *Schroeppel v. Corning*, 6 N. Y. 117.

⁸ *Bedell v. Janney*, 4 Gilm. 193, and cases cited in last section.

⁹ *Haas v. Damon*, 9 Iowa, 589; *Hemenway v. Hemenway*, 5 Pick. 389; *Brown v. Arnott*, 6 Wetts & S. 402.

¹⁰ *Tillotson v. McCrillis*, 11 Vt. 477; *Wiley v. Logan*, 95 N. C. 358.

¹¹ *Wiley v. Logan*, 95 N. C. 358; *Tillotson v. McCrillis*, 11 Vt. 477.

retains it after the period when he should, of right, have turned it over to the principal,¹ or where he otherwise improperly withholds it from the principal,² or where he has employed it for the purpose of gain for himself.³ An agent who, having received money of his principal to perform a certain trust, wholly omits to perform his duty, and converts the money to his private use, thereby renders himself liable to an action *ex delicto*, or to an action of *assumpsit* for money had and received to the use of the plaintiff. But where he actually enters upon and performs the duties of the trust, neither of such actions will lie against him for the recovery of an alleged balance of money so intrusted to him. The remedy against him is by action of account render, or by bill in equity.⁴ Where the agent keeps the money by him to pay it over when the principal calls for it,⁵ he is not liable for interest. The agent is only called upon to account to his principal. Thus if the principal is the trustee of another, he is not obliged to account to that other,⁶ and a subagent must account to the agent, and not to the principal.⁷

ILLUSTRATIONS.—A principal drew an order directing his agent to deposit the proceeds of certain lumber to the credit of a third person. The next day he demanded of the agent an account of the proceeds, who replied that he had nothing to do with him, and referred him to such third person. *Held*, that this did not constitute an unreasonable refusal to account: *Torrey v. Bryant*, 16 Pick. 528.

§ 90. **Cannot Dispute Principal's Title.**—An agent is not allowed to dispute the title of his principal.⁸ Thus

¹ Dodge v. Perkins, 9 Pick. 368.

² Anderson v. State, 2 Ga. 370; Bedell v. Janney, 4 Gilm. 193.

³ Williams v. Storrs, 6 Johns. Ch. 353; 10 Am. Dec. 340.

⁴ Reeside v. Reeside, 40 Pa. St. 322; 88 Am. Dec. 503.

⁵ Williams v. Storrs, 6 Johns. Ch. 353; 10 Am. Dec. 340; Salisbury v. Wilkinson, cited in *Chedworth v. Edwards*, 8 Ves. 47.

⁶ Attorney-General v. Chesterfield, 18 Beav. 596; but see *Turner v. Turner*, 36 Tex. 41.

⁷ Stevens v. Badcock, 3 Barn. & Adol. 354; Cartwright v. Hatley, 1 Ves. Jr. 292; Cleaves v. Stockwell, 33 Me. 341; see *Louisville etc. R. R. Co. v. Blair*, 4 Baxt. 407.

⁸ Aubery v. Fiske, 36 N. Y. 47; Barnabo v. Kabbe, 54 N. Y. 516; Hancock v. Gomez, 58 Barb. 490;

an agent who has collected money cannot interplead his principal and a third party who claims it.¹ An agent who has collected money cannot deny the right of the principal to receive it; e. g., a collector of taxes cannot deny the right of the county thereto because illegally levied.² But if A verbally employs B as his agent to purchase a house for him, and B makes the purchase, takes the deed in his own name, and pays his own money for it, A cannot compel B to convey.³

ILLUSTRATIONS.—The plaintiff's agent sold a vessel, and paid the proceeds to the defendant for the plaintiff. *Held*, the former could not resist the claim of the latter for such money on the ground that the plaintiff did not own the vessel when sold: *Jenks v. Manson*, 53 Me. 209.

§ 91. **Mixing Property.**—He must not mix his own property with that of his principal.⁴ If the agent seeks to make his principal liable for losses,—as, for instance, by depreciation or theft,—he must keep his principal's money separate and distinct from his own.⁵ Thus where an agent deposits the money of a principal in a bank in his own name, he is liable for the loss if the bank fail.⁶ Where an agent mingles his principal's money with his own so that it cannot be followed, the principal cannot recover it specifically. But the agent does not by so doing convert himself into a mere debtor; the principal may claim from the admixture the sum which belonged to him.⁷

Marvin v. Elwood, 11 Paige, 365; *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 607; *Collins v. Tillou*, 26 Conn. 368; 68 Am. Dec. 398; *Reed v. Dugan*, 54 Ind. 306; *Firestone v. Firestone*, 48 Ala. 128; *Bain v. Clark*, 30 Mo. 252; *McNamee v. Reli*, 52 Miss. 426; *Betteley v. Reed*, 4 Q. B. 411.

¹ *Snodgrass v. Butler*, 54 Miss. 45.

² *Placer County v. Astin*, 8 Cal. 303; *Clark v. Moody*, 17 Mass. 145, 148; *Hammond v. Christie*, 5 Reb. (N. Y.) 160.

³ *Wallace v. Brown*, 10 N. J. Eq. 308.

⁴ *Rogers v. Boehm*, 2 Esp. 702; *Wharton on Agency*, sec. 243; *Drake v. Martin*, 1 Beav. 525.

⁵ *School District v. First Nat. Bank*, 102 Mass. 174; *Webster v. Pearce*, 35 Ill. 159; *Bartlett v. Hamilton*, 46 Me. 435; *Massachusetts Ins. Co. v. Carpenter*, 2 Sweeny, 734; *Marine Bank v. Fulton Bank*, 2 Wall. 252.

⁶ *Hammon v. Cottle*, 6 Serg. & R. 290; *Case v. Abeel*, 1 Paige, 393; *In re Stafford*, 11 Barb. 353; *Cartmell v. Allard*, 7 Bush, 482; *Massachusetts Ins. Co. v. Carpenter*, 2 Sweeny, 734; *Greene v. Haskell*, 5 R. I. 447; *Seargent v. Downey*, 49 Wis. 524.

⁷ *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215.

§ 92. **Agent Making Profits.**—An agent is employed to further the interest of his principal; it is his duty to give to the principal's affairs his care and skill, and to act in all things for his interest. Therefore, it is an old principle of law that an agent shall not be permitted to make a secret profit or advantage out of his agency.¹ The principle is, that an agent must not use his fiduciary powers for his own benefit.² He cannot take advantage of information which he has acquired through his position to use it for his own benefit.³

ILLUSTRATIONS.—An agent intrusted with a mortgage for sale was offered four thousand eight hundred dollars for it, but concealed the offer from his principal and purchased it himself from him for four thousand five hundred dollars. *Held*, that he must account to the principal for any profit made by him out of the sale: *Mason v. Bauman*, 62 Ill. 76. A broker is employed to buy a ship as cheaply as possible. In making the purchase he receives from the vendor a commission. The principal is entitled to it: *Morison v. Thompson*, L. R. 9 Q. B. 480. A bank president has authority to certify checks. He will not be permitted to certify his own checks: *Clafin v. Bank*, 25 N. Y. 293. An agent abroad is authorized to sell a cargo for bills on England to be placed subject to his principal's order. The agent invests them in goods on his own account. He is liable for the profits to the principal: *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168. A railroad company, on the application of one of its station agents, agreed to furnish an excursion train for a third party. There was no such third party; but the agent was getting up the excursion for his own profit. Discovering this afterwards, the company refused to furnish the train. *Held*, that the agent had no right of action: *Pegram v. Charlotte etc. R. R. Co.*, 84 N. C. 696; 37 Am. Rep. 639.⁴ A warehouseman who was

¹ *Bain v. Brown*, 56 N. Y. 285; *Moore v. Mandelbaum*, 8 Mich. 433; *Cool v. Phillips*, 66 Ill. 217; *Coursin's Appeal*, 79 Pa. St. 220; *Wilson v. Wilson*, 4 Abb. App. 621; *De Bussche v. Alt*, L. R. 8 Ch. Div. 286; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Miller v. L. & N. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722.

² *Eshelman v. Lewis*, 49 Pa. St. 410.

³ *Ringo v. Binns*, 10 Pct. 269; *Reed v. Norris*, 2 Mylne & C. 374; *Henry v.*

Raiman, 25 Pa. St. 354; 64 Am. Dec. 703; *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Norris v. Tayloe*, 49 Ill. 17; 95 Am. Dec. 568.

⁴ "The plaintiff could not, from his fiduciary relations towards the company, enter into a binding contract with it. The law, in harmony with sound morals, refuses its sanction to any measure, though assuming the form of contract, procured by a fiduciary from his principal in violation of the trusts reposed in him, and to the injury of the latter, at least unless

occupying premises under a lease about to expire was negotiating for a renewal. His clerk, who had access to his books and

such principal is fully advised of all the circumstances, and knows at the time that he is dealing with one then divested of his agency, and acting in an adversary and independent capacity"; *Pegram v. Charlotte etc. R. R. Co.*, 84 N. C. 696; 37 Am. Rep. 639. An employee of a lessee of a theater, shortly before his lease expired, secretly procured a lease of the premises for a new term to himself at an advanced rent. *Held*, that he held the new lease as a trustee for his employer: *Davis v. Hamlin*, 108 Ill. 39; 48 Am. Rep. 541. "The obtaining of the lease by Davis," said the court, "amounted to a virtual destruction of his employer's whole business at the termination of the old lease, under which the latter was holding. By some ten years of labor, Hamlin had built up a business of a very profitable character. There was a good-will attached to it, which was valuable. Hamlin was intending to make it a lifetime business. Sustaining this lease to Davis, at the end of Hamlin's lease, April 18, 1883, all this business would come to an end, and pass, good-will and all, from Hamlin, the employer, into the hands of Davis, the employee. And this would have been accomplished by the means of a renewal lease obtained by a confidential agent in violation of the duty of his relation, and acquired, presumably, because of peculiar means of knowledge of the profitableness of the business, afforded him by the confidential position in which he was employed. A personal benefit thus obtained by an agent equity will hold to inure for the benefit of the principal. Public policy, we think, must condemn such a transaction as that in question. To sanction it would hold out a temptation to the agent to speculate off from his principal to the latter's detriment. Davis very well knew that his employer would be willing to pay a much higher rent than that at which he obtained the lease, and that he could dispose of the lease to Hamlin at a large profit to himself, and such means of knowledge was derived from his position as agent. If a manager of a business were allowed to obtain such a

lease for himself, there would be laid before him the inducement to produce in the mind of his principal an under-estimate of the value of the lease, and to that end, maybe, to mismanage so as to reduce profits, in order that he might more easily acquire the lease for himself. It is contended by appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but the specific employment to engage amusements for the theater, and that he was an agent only within the scope of that employment; that Hamlin, having a lease which would expire April 16, 1883, had no right or interest in the property thereafter; and that Davis, in negotiating for the lease, did not deal with any property wherein Hamlin had any interest, and that such property was not the subject-matter of any trust between them. Although there was here no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal, which courts of equity have recognized as an interest of value, secretly to interfere with which, and disappoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal. There was the good-will of the business, which belonged to the business as a portion of it, and this the agent got for himself. It is further argued that the relation here between Hamlin and Davis was that of master and servant, or employer and employee, and that the rule has never been applied to that relation as a class, and that the classes coming within that doctrine are embraced within the list of defined confidential relations, such as trustee and beneficiary, guardian and ward, etc. The subject is not comprehended within any such narrowness of view as is presented on appellant's part. And applying the rule it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation."

papers, and knew his business pending that negotiation, secretly obtained a lease to himself and another. *Held*, that they would be compelled to transfer the lease to the master: *Gower v. Andrew*, 59 Cal. 119; 43 Am. Rep. 242.¹ A, being financially embarrassed, called on B to assist him, and agreed to pay B liberally for his time and expenses. B accordingly purchased A's outstanding draft, and A gave notes to B in payment therefor. *Held*, that B was A's agent in purchasing the draft; and that the discount at which he secured it must inure to A's benefit: *Noyes v. Landon*, 59 Vt. 569. An agent by false and fraudulent representation sold goods from his principal to himself so as to realize from a rise in value. *Held*, that he was liable for exemplary damages: *Peckham Iron Co. v. Harper*, 41 Ohio St. 100. A principal agreed to pay his agent a certain commission on the amount for which land was sold if the agent furnished a buyer within a certain time at not less than a certain price, and the agent furnished a purchaser at more than that price. *Held*, that the agent was not entitled to any surplus above the fixed price: *Blanchard v. Jones*, 101 Ind. 542.

§ 93. **Purchasing and Selling Property.**—Therefore an agent is not allowed to purchase his principal's property, which is in his hands to manage and direct.² An agent

¹ "We understand it to be the duty of the employee," said the court, "to devote his entire acts, so far as his acts may affect the business of his employer, to the interests and service of the employer; that he can engage in no business detrimental to the business of the employer; and that he should in no case be permitted to do for his own benefit that which would have the effect of destroying the business to sustain and carry on which his services have been secured. An agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal's interest to his own. An agent or subagent who uses the information he has obtained in the course of his agency as a means of buying for himself will be compelled to convey to the principal: *Elliott v. Merryman*, 1 Lead. Cas. Eq. 91. It may be said that Andrew was not the agent of plaintiffs so far as concerns the obtaining of a renewal of the lease; that he was not charged with the duty of obtaining a renewal; it must, however,

be said that he was, by virtue of his employment, charged with the duty of furthering their interests, and with the duty of not using the information obtained by him as their employee to their detriment. It seems to us that if Andrew desired to engage in the same business as his employers, on his own account, a very plain and very proper course was open to him, viz., to state to them all the facts, and ask them to determine whether they desired a renewal. By pursuing the course which he did, he gave to Hopkins an inducement not only not to give plaintiffs a renewal at a decreased rental, but also an inducement not to renew at the then rental, and he compelled plaintiffs to have an unknown competitor who based his action upon knowledge acquired by him while in their employ. We do not think that this is equity or good conscience."

² The clerk of an agent to sell lands who is employed or concerned in the affairs of the seller relating to the lands is alike with his principal prohibited from purchasing, and if he

employed to purchase property for his principal cannot purchase it for himself.¹ Where a debtor employs an agent to effect a compromise with his creditors, such agent cannot purchase a debt against his principal, for his own benefit; and though the principal neglects to reimburse the agent for the amount paid by him in purchasing the debts of the principal, such agent is entitled to hold the claims so purchased only for the amount paid, and a reasonable compensation for his services.² Nor can he purchase his own property for his principal.³ An agent cannot fill an order by selling his own stock, even with the most honest intentions and at a fair market price, unless he discloses to his principal the ownership of the stock; if he does so fill it, the principal may repudiate the transaction, return the stock, though after it has become worthless in the market, and recover back the consideration.⁴ So an agent employed to purchase will not be permitted to sell to his principal for a higher price than he paid himself.⁵ But the rule that he who undertakes to act for another must not act for his own benefit, and to the detriment of his principal, does not apply where the principal has authorized the agent to do so.⁶

An agent cannot, without the principal's consent, become the purchaser of property which he is employed by

does so, the seller may compel him to reconvey the lands, or account for their proceeds: *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 193.

¹ *Ringo v. Binns*, 10 Pet. 269; *Dobson v. Racey*, 3 Sand. Ch. 61; *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. Bank of New Orleans*, 9 Paige, 649; *Voorhees v. Presbyterian Church*, 8 Barb. 136; *Eshleman v. Lewis*, 49 Pa. St. 410; *Smith v. Brotherline*, 62 Pa. St. 461; *Wolford v. Herrington*, 74 Pa. St. 311; 15 Am. Rep. 548; *Von Hurter v. Spengeman*, 17 N. J. Eq. 185; *Fisher v. Krutz*, 9 Kan. 501; *Armstrong v. Elliott*, 29 Mich. 485; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Follansbe v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691.

² *Reed v. Warner*, 5 Paige, 650.

³ *Dorris v. French*, 4 Hun, 292; *Conkey v. Bond*, 36 N. Y. 427; *Tewksbury v. Spruance*, 75 Ill. 187; *Ely v. Hanford*, 65 Ill. 267; *Gould v. Gould*, 36 Barb. 270; *Taussig v. Hart*, 58 N. Y. 425; *Bentley v. Craven*, 18 Q. B. 720; *Sharman v. Brandt*, L. R. 6 Beav. 75. But the principal may ratify it; and if he does so in part he does so *in toto*: *Ely v. Hanford*, 65 Ill. 267.

⁴ *Conkey v. Bond*, 34 Barb. 276.

⁵ *Taussig v. Hart*, 58 N. Y. 425; *Cottom v. Holliday*, 59 Ill. 176; *Ely v. Hanford*, 65 Ill. 267; *Collins v. Case*, 23 Wis. 230.

⁶ *Moody v. Smith*, 70 N. Y. 598.

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the principal to sell for him,¹ nor can he sell to a firm of which he is a member,² or to a third person for the benefit of that person and himself jointly.³ An agent in charge of real estate cannot acquire a tax title thereto adverse to his principal, who has failed to furnish him with the means to pay the taxes; the burden is on the agent to show that his agency had terminated when he acquired the title.⁴ Such a purchase or sale, however, is not void; as between the agent and third persons it is good, but it may be set aside at the suit of the principal within a reasonable time,⁵ or he may ratify it and make it valid.⁶ But an agent may lawfully purchase his principal's property, where the principal is fully advised and there is no fraud in the transaction,⁷ but the burden is on the agent to show this.⁸ And "it is not enough," said Jessel, M. R., in *Dunne v. English*,⁹ "for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure." Hence, where

¹ *Bain v. Brown*, 56 N. Y. 285; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Scott v. Mann*, 36 Tex. 157; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Marsh v. Whitmore*, 21 Wall. 178; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Tynes v. Grinstead*, 1 Tenn. Ch. 508; *Clute v. Barron*, 2 Mich. 192; *Dwight v. Blackmar*, 2 Mich. 330; 57 Am. Dec. 130; *Ames v. Port Huron Log Co.*, 11 Mich. 139; 83 Am. Dec. 731; *Kerfoot v. Hyman*, 52 Ill. 512; *Mason v. Bauman*, 62 Ill. 76; *Parker v. Vose*, 45 Me. 54; *White v. Ward*, 26 Ark. 445; *Stewart v. Mather*, 32 Wis. 344; *Eldridge v. Walker*, 60 Ill. 230; *Cleveland Ins. Co. v. Reed*, 1 Biss. 180; *Bartholemew v. Leech*, 7 Watts, 472; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Walker v. Palmer*, 24 Ala. 358; *Blount v. Robeson*, 3 Jones Eq. 73; *Armstrong v. Elliott*, 29 Mich. 485; *Guinea v. Allen*, 58 Mo. 541; *Collins v. Case*, 23 Wis. 230. The rule is the same where he is authorized to sell at a stipulated price: *Ruckman v. Bergholz*, 37 N. J. L. 437; *Tate v. Williamson*, 2 L. R. Ch. 55; *Jeffries v.*

Wiester, 2 Saw. 135; *Ingle v. Hartman*, 37 Iowa, 274; *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Moseley v. Buck*, 3 Munf. 232; 5 Am. Dec. 508.

² *Francis v. Kerker*, 85 Ill. 190; *Reimers v. Ridner*, 2 Rob. (N. Y.) 11.

³ *Hughes v. Washington*, 72 Ill. 84.

⁴ *Bowman v. Officer*, 53 Iowa, 640.

⁵ *Wadsworth v. Gay*, 118 Mass. 44; *Uhlich v. Muhlke*, 61 Ill. 499; *Greenwood v. Spring*, 54 Barb. 375; *Leach v. Fowler*, 22 Ark. 143; *Estes v. Boothe*, 20 Ark. 583; *Eastern Bank v. Taylor*, 41 Ala. 93; *Taussig v. Hart*, 49 N. Y. 301; *Cleveland Ins. Co. v. Reed*, 1 Biss. 180. But the sale or purchase is voidable as to third parties who have notice: *Norris v. Tayloe*, 49 Ill. 18; 95 Am. Dec. 568.

⁶ *Walworth v. Bank*, 16 Wis. 629.

⁷ *Fisher's Appeal*, 34 Pa. St. 29; *Brown v. Post*, 1 Hun, 303; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Comstock v. Comstock*, 57 Barb. 453.

⁸ *Wharton on Agency*, sec. 232; *Murphy v. O'Shea*, 2 Jones & L. 422.

⁹ L. R. 18 Eq. 524.

an agent represented to his principal that he could sell the latter's mining property to one P. for one hundred thousand dollars, concealing the fact that he had already contracted to sell it to him for two hundred thousand dollars, it was held that on discovery of the fraud the principal might recover of the agent to whom he sold the property the difference between the price paid by the agent and the sum received by him on the sale to P.¹ An agent selling at auction may bid on behalf of a third person.² After an agent or trustee has fully discharged his duty in the sale of property, he may make an independent purchase of it from the owner under his sale.³ If one who is clearly an agent for another to purchase property repudiates the agency and acts for himself, using his own funds, he cannot be declared a trustee for his principal, although the latter may have been misled by his conduct.⁴

ILLUSTRATIONS.—A is employed by B to manage his property and pay his taxes. B's property is sold at a tax sale. A cannot become a purchaser: *Curtis v. Cissna*, 7 Biss. 260; *Franks v. Morris*, 9 W. Va. 664; *Fountain Coal Co. v. Phelps*, 95 Ind. 271. An agent is employed to collect the rents and to exercise control over the principal's property in his absence. The agent cannot purchase the property at an execution sale: *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304. An agent employed to collect and foreclose a mortgage took a conveyance of the equity of redemption to himself. *Held*, that he took the title as trustee for his principal: *Giddings v. Eastman*, 5 Paige, 561. An agent employed to take up an outstanding mortgage took an assignment to himself. *Held*, that he held it as trustee for his principal: *Case v. Carroll*, 35 N. Y. 385. The agent for the owner of land purchased a tax certificate, and afterwards took the tax deed to himself. *Held*, that he would be held a trustee for the owner, and liable for the rents and profits: *Collins v. Rainey*, 42 Ark. 531. An agent makes a purchase outside the actual purview of his agency. At the time it was made he assumed to act for his principal and purchased for his benefit. *Held*, that the transaction as against the agent will inure to the benefit of the principal: *Watson v. Union Iron and Steel Co.*, 15 Ill. App. 509. An agent furnished with

¹ *Brown v. Post*, 1 Hun, 303.

² *Scott v. Mann*, 36 Tex. 157.

³ *Walker v. Carrington*, 74 Ill. 446.

⁴ *First Bank v. Bissell*, 2 McCrary, 73.

money to pay off all encumbrances on certain land fraudulently purchased a tax deed thereon. *Held*, to acquire no title thereunder: *Woodman v. Davis*, 32 Kan. 344. A employed B to purchase land on commission. B had previously negotiated for a purchase on his own account. This he completed, and sold to A at an advance, not disclosing the fact that he was the owner. *Held*, that A on discovering this could not retain the property and recover the advance paid: *Sunderland v. Kilbourn*, 3 Mackey, 506. A stock-broker is employed to purchase stock for a customer. He cannot buy of himself to fill the order: *Taussig v. Hart*, 58 N. Y. 425. A commission merchant has an order from a principal to purchase cotton for him. He cannot fill the order with his own cotton or with cotton he has to sell: *Beal v. McKiernan*, 6 La. 407. A broker was authorized by his principal to buy for him in the market two hundred tons of hemp. He drew up and forwarded to the principal a broker's note, there being no seller but himself. *Held*, that the principal was not bound: *Sharman v. Brandt*, L. R. 6 Q. B. 720.¹

§ 94. Agent of Both Parties.—One cannot act secretly as agent for both the parties to a contract where the matter requires the exercise of discretion and judgment.² Such a contract may be repudiated by either party.³ "The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit, which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent for the purchaser, to buy it

¹ "If a man employ another as broker to go into the market and purchase goods for him at a certain price, the other could not under such authority make himself a principal in the contract of sale and purchase": *Sharman v. Bandt*, L. R. 6 Q. B. 720.

² *Copeland v. Ins. Co.*, 6 Pick. 204; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *New York Ins. Co. v. National Ins. Co.*, 14 N. Y. 85; *Great West-*

ern Ins. Co. v. Cunliffe, 10 Eng. Rep. 561; *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416; *Bollman v. Loomis*, 41 Conn. 581; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Stewart v. Mather*, 32 Wis. 344; *Grant v. Hardy*, 33 Wis. 668; *In re Taylor Orphan Asylum*, 36 Wis. 534.

³ *Mercantile Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408.

for the lowest. These duties are so utterly irreconcilable and conflicting, that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to prosecute the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that the vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them."¹ Nor can he earn and receive compensation from both.² The rule is, that one cannot take up an adverse interest to that which he is engaged to perform. But it is obvious that a double agency may be undertaken with the consent of the principal, and in certain cases it is customary to do so. Thus brokers,³ or a middle-man in an exchange,⁴ may act for both parties, and receive compensation from each;⁵ and so, of course, where each party

¹ Bigelow, C. J., in *Farnsworth v. Hemmer*, 1 Allen, 494; 79 Am. Dec. 756.

² *Lloyd v. Calston*, 5 Bush, 587; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Farnsworth v. Hemmer*, 1 Allen, 494; 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168; *Everhart v. Searle*, 71 Pa. St. 256; *Place v. Greenman*, 6 N. Y. Sup. Ct. 681; *Meyer v. Hanchett*, 39 Wis. 419; *Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Schwartz v. Yearly*, 31 Md. 270. (In *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, it was held that a broker acting for both parties in effecting an exchange of property can recover compensation from neither if his double employment is not known or assented to by both.) *Scribner v. Collar*, 40 Mich. 375; 29

Am. Rep. 541; *Smith v. Townsend*, 109 Mass. 500; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 528. Illustrations: A broker was employed by A to sell his farm. He exchanged it for lands of B, receiving a commission from A for his services. Held, that he could not recover a commission from B; also, even on proof of a promise by B to pay him a commission: *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66.

³ *Rowe v. Stevens*, 3 Jones & S. 189; *Spyer v. Fisher*, 5 Jones & S. 93.

⁴ *Mullen v. Keetzieb*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416; *Siegel v. Gould*, 7 Lans. 177; *Orton v. Schofield*, 61 Wis. 382; *Green v. Robertson*, 64 Cal. 75.

⁵ *Alexander v. University*, 57 Ind. 466; *Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Meyer v. Hanchett*, 39 Wis. 419.

has notice that he is acting for both, and each agrees to pay him a commission.¹ A contract made by a person as agent of both parties is not void, but only voidable, and must be repudiated within a reasonable time,² for it may be ratified and made valid by either party.³ A person who voluntarily employs the agent of another cannot take advantage of the rule of law forbidding double agencies,⁴ nor can such an agent set it up for the purpose of shielding himself from liability to one of the parties.⁵ An agent, or servant, on a fixed salary, who sells articles to his employers, under a contract with the owner of such articles, for a remuneration, his employers knowing of his interest, can claim his remuneration from such owner.⁶

¹ *Rowe v. Stevens*, 53 N. Y. 621.

"The general rule is not applicable to a case in which a man is acting as the agent of both the vendor and purchaser, with the authority and consent of the parties interested"; *Alexander v. Northwestern etc. Co.*, 57 Ind. 466; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 528; *Joslin v. Cowee*, 56 N. Y. 626; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rolling Stock Co. v. Railroad Co.*, 39 Ohio St. 450; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Capener v. Hogan*, 40 Ohio St. 203.

² *Greenwood v. Spring*, 54 Barb. 375; *Bruce v. Davenport*, 1 Abb. App. 233.

³ *Walworth v. Farmers' L. & T. Co.*, 16 Wis. 629; *Stewart v. Mather*, 32 Wis. 345; *Smith v. Townsend*, 109

Mass. 500; *White v. Ward*, 26 Ark. 445.

⁴ "Two parties may always, by mutual consent, no matter how diverse their interests, make a third their agent. It is true that if A have an agent, that agent cannot, without A's consent, act as agent of B in a matter in which A's interest conflicts with B's. But B, who selects the agent knowing that he is the agent of A, cannot object to take advantage of his own wrong in giving knowingly to the agent a trust conflicting with his duty to A"; *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330; 2 Am. Rep. 577.

⁵ *Cottom v. Holliday*, 59 Ill. 176.

⁶ *Wright v. Welch*, 3 McAr. 479.

CHAPTER X.

DUTIES AND LIABILITIES OF PRINCIPAL TO AGENT.

- § 95. Right of agent to compensation from principal.
- § 96. When agent cannot recover compensation.
- § 97. Right of agent to reimbursement from principal.
- § 98. When agent cannot ask reimbursement.

§ 95. Right of Agent to Compensation from Principal.

—An agent performing services for a principal is entitled to compensation from him therefor,¹ unless he is a gratui-

¹ *Mangum v. Ball*, 43 Miss. 288; 5 Am. Rep. 488; *Briggs v. Boyd*, 56 N. Y. 289. See *post*, Part IV., Brokers. In *Guild v. Guild*, 15 Pick. 130, Shaw, C. J., said: "Some of the court are of opinion that as it is the ordinary presumption, between strangers, that upon the performance of useful and valuable services in the family of another, it is upon an implied promise to pay as much as such services are reasonably worth, so, after the legal period of emancipation, the law raises a similar implied promise from a father to a daughter. Other members of the court are of opinion (confining the opinion to the case of daughters, and expressing no opinion as to the case of sons laboring on a farm or otherwise in the service of a father) that the prolonged residence of a daughter in her father's family after twenty-one, performing her share in the ordinary labors of the family, and receiving the protection and supplies contemplated in the supposed case, may well be accounted for upon considerations of mutual kindness and good-will, and mutual comfort and convenience, without presuming that there was any understanding or any expectation that pecuniary compensation was to be made; that proof of these facts alone, therefore, does not raise an implied promise to make any pecuniary compensation for such services, or throw on the defendant the burden of proof to show, affirmatively, that the daughter performed

the services gratuitously, and without any expectation of receiving wage, pecuniary compensation, but with a view to the share she might hope to receive in her father's estate, or otherwise. But the court are all of opinion that practically the question is of much less importance than at first view it would appear. Those who think that the law raises no implied promise of pecuniary compensation from the mere performance of useful and valuable services, under the circumstances supposed, are nevertheless of opinion that it would be quite competent for the jury to infer a promise from all the circumstances of the case; and that although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise and a *quantum meruit*; but if otherwise, then they should find that there was no implied promise. The conclusion that the question is of less practical importance than might at first appear is founded upon the obvious consideration that it is scarcely possible that a case can be left to stand upon the mere naked presumption arising from the fact of the prolonged residence of a daughter in the family of

tous agent,¹ or unless the nature of the service performed or the express or implied understanding between the parties show that no claim for pay was intended.² The man-

her father, and the performance of services. There must of necessity be a great diversity of circumstances distinguishing one case essentially from another. Such a continued residence of a daughter may — indeed must — be regarded under one of these three aspects: she may be a servant or housekeeper, expecting pecuniary compensation for services; or a boarder, expecting to pay a pecuniary compensation for accommodations and subsistence; or she may be a visitor, expecting neither to make nor pay any compensation. Perhaps it might be safe to consider the latter predicament as embracing the larger number of cases. Now, the circumstances under which the parties continue to reside together, and which must almost necessarily be disclosed in the progress of each trial, will go very far to show in which of these relations the daughter stood. Such considerations as the following, among many others, would arise: What is the state and condition of the family as to affluence? was the father carrying on a business or engaged in an employment usually requiring the aid of hired females? had he been accustomed to employ such before the daughter came of age? did he employ such afterwards? had the father a wife living? was she capable of managing her family, or was he a widower? did the daughter act as housekeeper? had the father been accustomed to employ a housekeeper on wages? did he cease doing so? were there one or two or more daughters similarly situated? did they share in the labors of the family, or did the plaintiff exclusively devote herself to service of the family? had the daughter property or means of her own to support herself, or had she been employed on wages in other families? Many other considerations of a like kind might be suggested, some and probably many of which must present themselves in each case, and all of which it would be proper for a jury to take into consideration in deciding the question of an implied promise of pecuniary compensation upon either side."

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¹ *Bartholomew v. Jackson*, 20 Johns. 28; 11 Am. Dec. 237. One who undertakes, as a mere act of friendship, to receive a note from another, and to deliver it for collection into the hands of an attorney, cannot, after the death of the person from whom he received it, maintain a claim against his estate for services voluntarily rendered in the prosecution of the suit for the collection of the note: *Morrow v. Allison*, 39 Ala. 70; *Hill v. Williams*, 6 Jones Eq. 242.

² "In respect to gratuitous agents or mandataries, the consideration of their rights properly belongs to a treatise on bailments, and need not be touched in a treatise on agency. In respect to agents or attorneys in fact merely to sign a deed or to do some other single ministerial act for another, it is not usual either to pay or to stipulate for pay for the execution of such fugitive acts. They are ordinarily treated as acts of friendship or benevolence, and are performed from a mere sense of duty or from personal regard, and are wholly of a gratuitous nature": *Story on Agency*, sec. 324; *Hinds v. Henry*, 36 N. J. L. 328; *Hill v. Williams*, 6 Jones Eq. 242; *Eaton v. Benton*, 2 Hill, 578; *Morrison v. Orr*, 3 Stew. & P. 49; 23 Am. Dec. 319. A renders services to B in the hope of a legacy from B, and relying solely on B's generosity. B dies leaving A nothing. A has no action against B for his services, but *aliter* if it was understood between A and B that B should recompense him by will, and he does not: *Robinson v. Raynor*, 28 N. Y. 494; *Martin v. Wright*, 13 Wend. 460; 28 Am. Dec. 468. In the last case it was said: "A reference to some of the cases will show the circumstances under which services rendered shall be considered gratuitous. The case of *Osborn v. Governors of Guy's Hospital*, 2 Strange, 728, is often referred to on this point, though it was only a *nisi prius* decision. That was an action for services rendered to Mr. Guy in his stock affairs. It appeared as if Osborn did not expect to be paid,

aging agent of a steamboat company, who acts as captain of one of its boats, has, in the absence of contract, a right to compensation for his services as such.¹ So also a stockholder in a joint-stock company, who acts as trustee and agent of the company.² A tenant in common of lands, employed as agent by special agreement between himself and co-tenant to take charge of the land, make sales thereof at certain prices, receiving a commission of five per cent on sales, may sue his co-tenant for the services rendered, in respect to the land, outside of selling it.³ One who employs an agent to negotiate a contract, and afterwards, as towards the other contracting party, ratifies the con-

but to be considered for it in the will of Guy; and the chief justice directed the jury that if such was the case, they could not find for the plaintiff, though nothing was given him; that they should consider how it was understood by the parties at the time of doing the business, and that a man who expects to be made amends by a legacy cannot afterwards resort to his action. So in the case of *Le Sage v. Coussmaker*, 1 Esp. 189, Lord Kenyon said that the law was well settled that if the plaintiff had performed the services without any view to reward but to a legacy, that a demand for services could not be sustained; of that the jury were to judge. In the case of *Jacobson v. Executors of Le Grange*, 3 Johns. 199, the plaintiff lived with his uncle, the testator, at his request eleven years; and the uncle said the plaintiff should be one of his heirs, and proposed to plaintiff's mother-in-law to give him three hundred and fifty pounds in land as a compensation for his services. The plaintiff had never made any claim upon the testator. The jury found a verdict for the plaintiff. Van Ness, J., in giving the opinion of the court, intimates that the plaintiff could not recover if the services were rendered without any view to compensation other than such as the testator chose to make by his last will and testament; but he also says that the services having been performed for the benefit of the testator, with his knowledge and approbation,

the law implies a promise to pay, unless it can be shown that payment was never intended. In *Patterson v. Patterson*, 13 Johns. 379, 380, the same learned judge says that the plaintiff is entitled to a reward for his services, unless they were to be performed gratuitously. He cites the cases I have above referred to in *Strange and Espinasse*, and intimates that if the understanding of both parties was that the services should be paid for by a provision in the will, a right of action would accrue, provided no provision should be made. So, too, in *Little v. Dawson*, 4 Dall. 111, the rule is said to be that if the services were rendered merely in expectation of a legacy, without any contract, express and implied, but relying solely on the testator's generosity, no action can be maintained; but in that case the testator had said he meant to provide for plaintiff as a child; which was left, as a matter of fact, for the jury to decide whether the services were gratuitous. These cases surely go far enough in favor of the defendants. It was a question for the referees in this case to decide whether the services were intended to be paid for. They have found that compensation was expected and intended at the time they were rendered, and the evidence fully sustains their finding."

¹ *New Orleans Packet Company v. Brown*, 36 La. Ann. 138; 51 Am. Rep. 5.

² *Spence v. Whitaker*, 3 Port. 297.

³ *Thompson v. Salmon*, 18 Cal. 632.

tract which the agent obtains, cannot be heard, in a subsequent action by the agent for the compensation promised for his services, to dispute that the latter succeeded in negotiating a valid contract as desired.¹ If a person acts as an agent without authority, and his acts are ratified, he is entitled to the same compensation and remedy as if he had been duly authorized.² An allowance for commissions will not be made to an agent who continued to manage the property of a testator with the expectation of a legacy.³ That a principal recognized a subagent and accepted his services does not necessarily prove an agreement to pay for said services.⁴ Where an agent informed his principal that he should charge no commissions for his services, he was held to be precluded from charging commissions during the life of the principal, though the principal had recognized the agent's right to commissions.⁵ Where an agent complains to his principal that the terms of the contract are too onerous upon him, and seeks and procures a modification rendering it more favorable to him, the utmost good faith is required from him in such negotiation; and, upon any misrepresentation shown, the courts will hold the modification void, and settle the accounts and dealings of the agency according to the original contract.⁶ A general agent for an insurance company, discharged for failure to account according to his contract, has no interest in premiums thereafter to be collected on policies issued through his agency.⁷ One employed to find a customer for stock at a certain price is entitled to his commission, although the principal sell to the customer found at a lower price, the agent having nothing to do with the reduction.⁸

¹ *Winpenny v. French*, 18 Ohio St. 469.

² *Wilson v. Dame*, 58 N. H. 392.

³ *Grandin v. Reading*, 10 N. J. Eq. 370.

⁴ *Homan v. Brooklyn Life Ins. Co.*, 7 Mo. App. 22.

⁵ *Higginson v. Fabre*, 3 Desaus. Eq. 89.

⁶ *Nelson v. Bowman*, 29 Gratt. 732.

⁷ *Phoenix Mut. Life Ins. Co. v. Holway*, 51 Conn. 311.

⁸ *Dexter v. Campbell*, 137 Mass. 198.

Where the agent has agreed to leave the amount of his compensation to his principal's discretion or generosity, he cannot recover more than the principal chooses to allow him.¹ But if the agreement is that he is to be allowed a reasonable compensation, to be fixed by his employer, he may sue for a reasonable compensation if the employer refuses or neglects to fix it.² Where the principal, having an agent in his employ, confers upon him additional powers which involve greater duties, with no stipulation for additional compensation, the agent cannot recover extra wages for such additional service.³ In the absence of an express contract as to the agent's compensation, it will be settled by proof of usage.⁴ But a usage giving an agent the profits of a transaction on the principal's behalf is invalid.⁵ So is a custom among insurance agents that they are entitled to all dividends declared by mutual companies, in lieu of other compensation, for effecting the insurance.⁶ And so is a custom allowing an agent to charge commission to both vendor and purchaser.⁷ Where A had agreed to pay B "twenty per cent upon all original or first-year premiums collected and paid in by him," B was not permitted to show that by the usage of the business premiums were treated as "collected and paid in," although, for the convenience of the assured, they were payable in subsequent installments.⁸ A custom, when goods are consigned to merchants for sale, and again consigned by them to others to sell, for each house to charge a commission of two and a half per

¹ An agent performs work for a committee under a resolution as follows: "That any service to be performed by him shall be taken into consideration, and such remuneration be made as shall be deemed right." *Held*, that no action would lie for compensation against the committee: *Taylor v. Brewer*, 1 Mass. & S. 290.

² *Story on Agency*, sec. 323.

³ *Moreau v. Dumagene*, 20 La. Ann. 230.

⁴ *Lawson on Usages and Customs*, sec. 151; *Brown v. Harrison*, 17 Ala. 774; *Halsey v. Brown*, 3 Day, 346.

⁵ *Diplock v. Blackburn*, 3 Camp. 43.

⁶ *Mim. Cent. R. R. Co. v. Morgan*, 52 Barb. 217.

⁷ *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen. 494; 79 Am. Dec. 756.

⁸ *Kimball v. Brawner*, 47 Mo. 398.

cent, the usual commission for selling goods, is void as against common reason and justice.¹ So is a custom of factors to charge both commissions and interest on advances.² A well-established custom among life insurance companies and their agents as to the kind and extent of property the agents may possess in the lists of policies they procure is admissible to explain a contract between them.³ A usage by which the seller of property is held liable to pay a commission to a broker whose services he has accepted, and who has introduced him to and brought him into negotiation with an ultimate buyer, and who is ready to continue his services until a sale is effected, is a reasonable one, in allowing a recovery for services accepted and rendered, even though the sale is finally effected by another broker.⁴ In an action on a promise to pay commissions to an insurance agent, evidence of a usage of the trade to pay commissions only on premiums actually collected is admissible.⁵ In the absence of any contract, the court in fixing the compensation of an agent will have regard to the extraordinary services and personal sacrifices of the agent, as well as the benefits received by the principal.⁶ An agent's commission, where he "agrees and obliges himself to manage a vessel, to the best advantage, according to his judgment, for the owner," does not depend upon the profitable result of the adventure, if he discharges his duty faithfully.⁷ An agent authorized to draw upon his employer for moneys becoming due to him—e. g., expenses—may maintain an action against the employer for maliciously refusing to honor drafts drawn accordingly.⁸

¹ *Spear v. Newell*, 23 Vt. 159; *Burton v. Blin*, 23 Vt. 151.

² *Smetz v. Kennedy*, Riley, 218.

³ *Ensworth v. New York etc. Ins. Co.*, 7 Am. Law Reg. 332.

⁴ *Loud v. Hall*, 106 Mass. 404.

⁵ *Müller v. Insurance Co.*, 1 Abb. N. C. 470. As to the right of brokers to compensation and commissions, see

post, Part IV., Brokers and Factors. As to construction of contracts of service as to compensation or salary, see *post*, Part V., Master and Servant.

⁶ *West New Jersey Society v. Morris*, Pct. C. C. 59.

⁷ *Stewart v. Rogers*, 19 Md. 98.

⁸ *Levy v. Curtiss*, 1 Abb. N. C. 189.

Customs, n, 17 Ala. y, 346.

³ Camp.

Morgan,

L. 158; 20 Hemmer, 56.

Io. 398.

ILLUSTRATIONS.—A loan was effected by an agent, who charged a commission for the service, and for becoming security for the repayment. *Held*, that a further commission was not chargeable for paying over the money to his principal, or on his orders: *Colton v. Dunham*, 2 Paige, 267. An agent acting under a power of attorney, duly recorded, which provided for the payment of the costs of the litigation arising in the transaction of the business, *held* entitled to a compensation for his services; and his claim is superior to that of one to whom the principal has assigned the fruits of the litigation: *Lane v. Coleman*, 8 B. Mon. 569. A commission merchant in Philadelphia, who was to receive five per cent for sale and guaranty, sent, without direction to do so, some of the goods to New York and Boston for sale, and paid five per cent for sale and guaranty. *Held*, that a charge by him of two and a half per cent in addition was inadmissible: *Van Dyke v. Brown*, 8 N. J. Eq. 657. Several joint owners of a cargo appoint one of their number as their agent to receive and sell the cargo and distribute the proceeds. *Held*, that he is entitled, under such special agency, to a commission or compensation for his services, as a factor or agent, in the same manner as a stranger: *Bradford v. Kimberley*, 3 Johns. Ch. 431. D. was entitled to a commission for every machine sold by the firm of A. & B., through his exertions, and after he had begun negotiations for the sale of a machine to G., the firm dissolved, and A. assumed for his sole benefit the performance of all existing copartnership engagements, and subsequently took in C. as partner, and the firm of A. & C. sold a machine to G., as the result of D.'s original negotiation. *Held*, that D. was entitled to his commission, and could maintain an action against A. therefor, who was liable to the same extent as if he had gone on alone in the business: *Sinclair v. Galland*, 8 Daly, 508. A marine insurance company in New York employed merchants in England as their agents, to settle claims and grant insurances, and also to effect reinsurances. A percentage was paid by the company on the first two classes of business, but the agents were remunerated as to the reinsurances by the brokerage allowed to them by the underwriters. They charged the company the full amount of the premiums, but were allowed by the underwriters, first, five per cent on the premiums; and secondly, twelve per cent on the balance (if any), payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the five per cent), and debiting losses. This was according to the usual custom on the credit system, as between brokers and underwriters, but the twelve per cent allowance was for some time unknown to the company. *Held*, that the agents were entitled to both the

percentages: *Great Western Ins. Co. of N. Y. v. Cunliff*, 43 L. J. Ch. 741; L. R. 9 Ch. 525; 31 L. T., N. S., 661.

§ 96. When Agent cannot Recover Compensation.—

There are cases in which an agent is prohibited from recovering the price of his services. They are, first, where the service was an illegal one;¹ second, where he has been guilty of gross negligence or unfaithfulness in the performance of his duties,² or neglects to keep accounts,³ or violates his instructions.⁴ If an agent for the performance of certain services for which a salary or yearly sum is to be allowed him neglect to keep an account of moneys received by him in his agency, and several annual accounts are settled between him and his principal, in which considerable amounts of money previously received by him are omitted to be credited to the principal, and the omission is not supplied until the principal, in consequence of information received from others, makes inquiry of the agent in reference thereto, the salary or yearly sum for the years in which such omission occurred should be disallowed.⁵

ILLUSTRATIONS.—A is employed by B as a "lobbyist" to procure the passage by Congress of a bill to pay B a claim he holds against the government. A cannot recover pay from B

¹ *McBratney v. Chandler*, 22 Kan. 692; *Crane v. Whittemore*, 4 Mo. App. 510; *Fareira v. Gabill*, 89 Pa. St. 89; *Paine v. France*, 26 Md. 46; *Smith v. Bouvier*, 70 Pa. St. 331; *Marshall v. Baltimore etc. R. R. Co.*, 16 How. 314; *Gray v. Hook*, 4 N. Y. 449; *Fuller v. Dame*, 18 Pick. 472; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; 40 Am. Dec. 519 (but see *Ormes v. Dauchy*, 45 N. Y. Sup. Ct. 85); *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361.

² *Sea v. Carpenter*, 16 Ohio, 412; *Smith v. Crews*, 2 Mo. App. 269; *Sawyer v. Mayhew*, 51 Me. 398; *Tyrrell v. Bank of London*, 10 H. L. 26; *In re Owens*, 7 I. R. Eq. 235; *Brannan v. Strauss*, 75 Ill. 235; *Short v. Millard*, 68 Ill. 292; *White v. Chapman*, 1

Stark, 113; *Vennum v. Gregory*, 21 Iowa, 326; *Cleveland etc. R. R. Co. v. Pattison*, 15 Ind. 70; *Porter v. Silvers*, 35 Ind. 295; *Sumner v. Reicheniker*, 9 Kan. 320; *Segar v. Parrish*, 20 Gratt. 672; *Prescott v. White*, 18 Ill. 322.

³ *Smith v. Crews*, 2 Mo. App. 269. But see *Sampson v. Somerset Iron Works*, 6 Gray, 129; *Brannan v. Strauss*, 75 Ill. 234; *Gallap v. Merrill*, 40 Vt. 133.

⁴ *Jones v. Hoyt*, 25 Conn. 386; *Hoyt v. Shipherd*, 70 Ill. 309; *Myers v. Walker*, 31 Ill. 354; *Fraser v. Wyckoff*, 63 N. Y. 445. Unless the principal ratifies his conduct: *Beall v. January*, 62 Mo. 434.

⁵ *Ridgway v. Ludlam*, 7 N. J. Eq. 123.

for this service: *Trist v. Child*, 21 Wall. 441. A broker sues his customer for commissions for services in stock-gambling for him. He cannot recover: *Fareira v. Gabell*, 89 Pa. St. 89. An attorney in the conduct of a suit makes a blunder by which all his previous work becomes useless. He cannot recover from his client for what he has done: *Bracey v. Carter*, 12 Ad. & E. 373. A broker in negotiating an exchange of real estate neglected to inform one of the parties, until the time limited for the exchange had expired, that the other refused to accept one of the lots because the taxes were unpaid. *Held*, that he could not recover commission for his services: *Fisher v. Dynes*, 62 Ind. 318. A steamboat captain kept his accounts so negligently that it could not be seen whether he or the owners were debtor to the other. *Held*, that he had forfeited his right to compensation: *Smith v. Crews*, 2 Mo. App. 269. A vessel was bought by an association of persons, and a conveyance taken in the name of certain others, as their agents. Compensation was refused to such agents, because of their misconduct: *The Taranto*, 1 Sprague, 170. A was employed by a railroad company to procure subscriptions to stock, and in the exercise of such agency, without the knowledge of the company, received reward from persons subscribing lands for stock, for procuring their lands to be taken by the company. *Held*, that the agency in behalf of the subscribers was inconsistent with the agency for the company, was an act of bad faith, and worked a forfeiture of all right to compensation from the company: *Cleveland etc. R. R. Co. v. Pattison*, 15 Ind. 70.

§ 97. Right of Agent to Reimbursement from Principal.—An agent is entitled to be reimbursed by his principal for all expenses legally and properly incurred in his behalf.¹ In equity the liability of a principal to indemnify

¹ *Ramsay v. Gardner*, 11 Johns. 439; *Child v. Morley*, 8 Term Rep. 610; *Maddick v. Marshall*, 16 Com. B., N. S., 387; *Wolff v. Horncastle*, 1 Bos. & P. 323; *Robinson v. Norris*, 51 How. Pr. 442; *Ruffner v. Hewitt*, 7 W. Va. 585; *White v. National Bank*, 102 U. S. 658; *Beach v. Branch*, 57 Ga. 362; *Searing v. Butler*, 69 Ill. 575; *Elliott v. Walker*, 1 Rawle, 126; *Colley v. Merrill*, 6 Me. 50; *Wynkoop v. Seal*, 64 Pa. St. 361; *Mears v. Adreon*, 31 Md. 229; *McCroskey v. Mabry*, 45 Ga. 327; *Hamilton v. Cook Co.*, 4 Scam. 519. In *Powell v. Trustees of Newburgh*, 19 Johns. 284, *Spencer, C. J.*, said: "Damages incurred by an agent, or in the course of a principal's

affairs, or in consequence of such management, are to be borne by the principal. It was admitted that where an agent on a journey on business of his principal was robbed of his own money the principal would not be answerable, because carrying his own money was not necessarily connected with the business of his principal. So if he received a wound the principal is not bound to pay the expense of the cure, for it was the personal risk of the agent. The distinction appears to be between those cases which arise naturally out of the agency, and such as are casual or oblique, not proceeding directly from the execution of the mandate."

his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal.¹ Judgment against the principal and agent in favor of the owner of chattels tortiously taken by the agent under command of the principal is conclusive upon the principal as to the ownership of the property, in an action by the agent against the principal upon the implied promise of indemnity.² The agent has a claim against his principal for the costs of defending his principal's property against a lawsuit,³ or other peril,⁴ for claims against him as an agent for which he was personally liable⁵ for acts done by him in the course of his agency, in which he has undertaken a liability or sustained a damage.⁶ A party acting as agent or employee for a

¹ Lacey v. Hill, Crowley's Claim, 43 L. J. Ch. 551; 22 Week. Rep. 586; L. R. 18 Eq. 182.

² Moore v. Appleton, 34 Ala. 147; 73 Am. Dec. 448.

³ Powell v. Trustees of Newburgh, 19 Johns. 284; D'Arcy v. Lyle, 5 Binn. 441; Hill v. Packard, 5 Wend. 375; Delaware Ins. Co. v. Delaunie, 3 Binn. 295; Frixione v. Tagliaferro, 10 Moore P. C. 175.

⁴ Wolff v. Horncastle, 1 Bos. & P. 323.

⁵ Power v. Butcher, 10 Barn. & C. 329; Turner v. Jones, 1 Lans. 147. One who, acting as agent, insures his principal's property in a company for which he is also agent, is entitled to be reimbursed the amount of premiums paid out by him: Rochester v. Levering, 104 Ind. 562.

⁶ Marland v. Stanwood, 101 Mass. 470; Ramsay v. Gardner, 11 Johns. 439; Hill v. Packard, 5 Wend. 375; Coventry v. Barton, 17 Johns. 142; 8 Am. Dec. 376; Allaire v. Onland, 2 Johns. Cas. 54; Avery v. Halsey, 14 Pick. 174; Moore v. Appleton, 26 Ala. 633; Drummond v. Humphreys, 39 Me. 347; Howard v. Clark, 43 Mo. 344; Tarr v. Northy, 17 Me. 113; 35 Am. Dec. 232; Nelson v. Cook, 17 Ill. 443; Grace v. Mitchell, 31 Wis. 533; 11 Am. Rep. 613; Yeatman v. Corder, 38 Mo. 337; Levy v. Curtis, 1 Abb. N.

C. 189; Saveland v. Green, 36 Wis. 612. In Greene v. Goddard, 9 Met. 222, it is said: "Where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability the orders of the principal cannot be executed at all, or not so well executed, and this is known by the principal at the time of giving his instructions and creating the agency, if a loss occur to the agent, it is most clear that he can look to the principal for indemnity for the damage sustained by him. And this rests upon those sound principles of common sense and mutual justice in the transaction of business upon which the law merchant, in its various branches, is founded; and which law, as it regulates and prescribes the rights and duties of principal and agent, alike furnishes protection to the agent when he suffers loss though fidelity to his employers, and gives redress to the principal who sustains an injury from the breach of orders or neglect of duty by the agent. In Ramsay v. Gardner, 11 Johns. 439, the plaintiff indorsed a bill drawn by the defendant. The indorsement was made by the plaintiff, as agent for the defendant. The bill was returned,

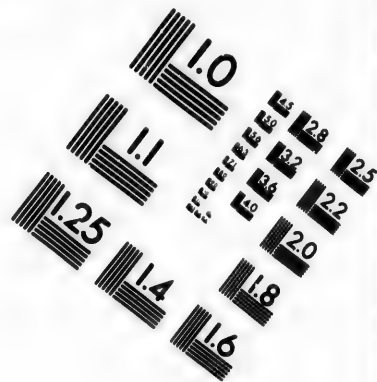
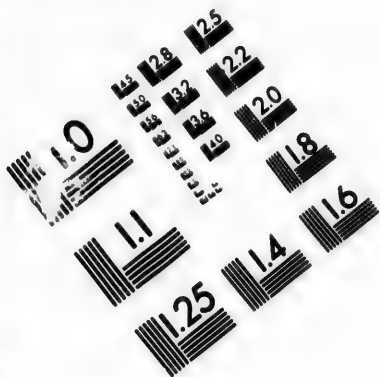
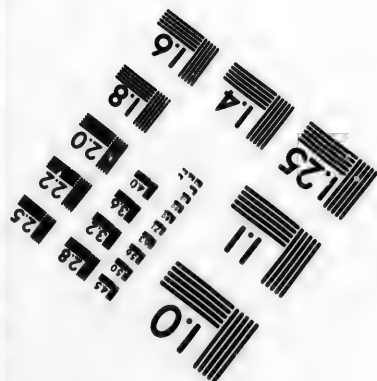
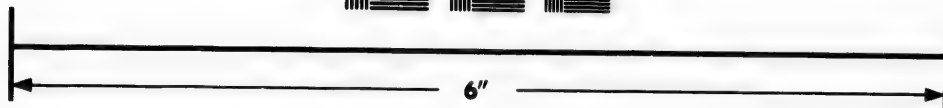
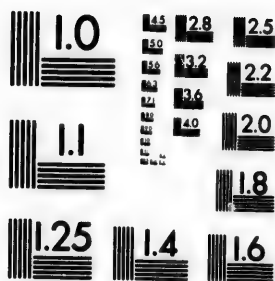


IMAGE EVALUATION TEST TARGET (MT-3)



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number of heirs in the prosecution of a land claim, under an agreement and contract, may withhold the payment of so much of the proceeds of the sale of the land which he has received for them as will be necessary to cover possible liabilities, on account of suits brought by settlers for improvements made on the land, unless the heirs give satisfactory security against loss resulting from such suits.¹ Under an agreement to collect debts and apply the proceeds to the payment of a debt due from the principal to the agent, such agent is entitled to deduct from the proceeds the rate of exchange between the place of collection and the place where the debt due him from the principal is payable, expenses of collection by suit or otherwise, and his reasonable commissions.² Where an agent has a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges, and commission, the costs of an action, with a reference thereof, against a wrong-doer who withholds the possession of the goods, *bona fide* incurred for the recovery of

and the plaintiff, as indorser, paid it, with the postages, protests, and twenty per cent damages. He brought his action to recover the sums so paid; and the court held that as he had acted as the agent of the defendant, and without benefit to himself, the money which he had paid was paid for his principal, and that he was entitled to recover. So in *Stocking v. Sage*, 1 Conn. 522, the court held that an agent who, in acting faithfully for his principal, is subjected to expense, is to be reimbursed; and that, if he is sued on a contract made pursuant to his authority, the law implies a promise by the principal to indemnify him. So in *D'Arcy v. Lyle*, 5 Binn. 411, the court approved the doctrine of the civil law, that where damages are incurred by an agent in the management of the business of his principal, or in consequence of it, the principal is responsible to him for the damages so incurred. See also *Powell v. Trustees of Newburgh*, 19 Johns. 284; *Child v. Morley*, 8 Term

Rep. 610. So in *Riggs v. Lindsay*, 7 Cranch, 500, where Riggs gave an order to Lindsay to purchase for his account a quantity of salt, and to draw as directed for payment, and the drawees refused to accept the bills which Lindsay drew, and he, in consequence of the non-acceptance, was obliged to take them up and pay damages thereon, it was held to be a payment of the debt of Riggs, who gave the order, and that there was no good reason for distinguishing between the damages and the principal sum. This, then, is a case of principal and agent, and the agents allege that in the faithful discharge of their duty they have sustained a direct loss, as well through the failure of the acceptors of the bills to pay them at maturity, as through the neglect of the defendant to place funds in the hands of the acceptors to provide for their payment, agreeably to his promise."

¹ *Bastable v. Denegre*, 22 La. Ann. 124.

² *Howe v. Wade*, 4 McLean, 319.

the goods, are legal charges upon the goods, and may be set off by the agent in an action brought against him by his principal for the balance of the proceeds of the goods.¹ An agent entitled to charge for expenses may recover the fair worth of his board, even though he actually paid nothing for it.²

ILLUSTRATIONS. — A employs B to buy stock for him. B buys the stock and pays for it. B is entitled to recover what he has paid from A: *Durant v. Burt*, 98 Mass. 161; *Giddings v. Sears*, 103 Mass. 311; *Brown v. Phelps*, 103 Mass. 313. An agent innocently sells void bonds without disclosing his principal. He can recover from him all damages incurred by him in making the sale: *Maitland v. Martin*, 86 Pa. St. 120. An agent is compelled to make allowance to vendees of cotton on account of defective packing. He may recover what he paid from his principal: *Beach v. Branch*, 57 Ga. 362. A railroad conductor was instructed by the company not to receive for fare a certain class of tickets. A passenger presented such a ticket, but the conductor refused to receive it and ejected the passenger. The latter brought an action against him and recovered judgment. *Held*, that the conductor had a right to recover against the company the amount of the judgment and the damage sustained by him: *Howe v. Buffalo etc. R. R. Co.*, 37 N. Y. 298.³ R. was authorized by A. to make bets for A. in the name of R., and having paid the moneys, sued A. to recover the same. *Held*, that though the bets were not recoverable at law against R., and were revoked before paid, yet, having paid them to save himself from being excluded from the ring, R. was entitled to indemnity from A: *Read v. Anderson*, 21 Cent. L. J. 173. Defendant applied to plaintiff to know how he

¹ *Curtis v. Barclay*, 7 Dowl. & R. 539; 5 Barn. & C. 141.

² *Moore v. Remington*, 34 Barb. 427.

³ "The plaintiff," said the court, "acted in good faith, and in obedience to the defendant's instructions. He supposed the company to possess the authority it assumed, and he found himself involved in a serious liability by fidelity in discharge of a duty imposed by his principal, where he was wholly free from intentional wrong. Under these circumstances, the company very properly assumed the burden of defending his act. Whether the judgment recovered against him was right or wrong is a question which does not arise on the present appeal.

If it was right, the defendants should have paid it without exposing him to imprisonment for an act done in good faith, in the interest and by the orders of the company. If it was wrong, the error should have been corrected by a review of the judgment. The appellants chose to abandon the defense and permit him to be the sufferer. The court below was right in holding that the plaintiff was entitled to redress. There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both if the principal really had the authority which he claimed."

should draw money from Scotland. Plaintiff advised him to draw a bill and send it to plaintiff to be forwarded. Defendant did so, and plaintiff indorsed and negotiated the bill; which, however, was returned protested, and plaintiff had to pay twenty per cent damages. *Held*, that plaintiff, having acted as the agent of defendant in good faith, and without expectation of profit, was entitled to recover back this loss from defendant: *Ramsay v. Gardner*, 11 Johns. 439. An agent purchased property for his principal, and was sued and arrested for the price which he was compelled to pay. *Held*, that his principal was bound to reimburse him for the amount paid, and costs and attorney's fees: *Clark v. Jones*, 16 Lea, 351.

§ 98. **When Agent cannot Ask Reimbursement.**—The disbursements or expenses, however, must not have been made without cause, or beyond the agent's authority or instructions,¹ or after his authority has been revoked;² nor must the agent have been guilty of negligence or unfaithfulness in his agency.³ If the money advanced by the agent, or the liability incurred by him, were advanced or incurred for an illegal or immoral purpose, no suit will lie by the agent against the principal for reimbursement,⁴ unless the agent had no knowledge of the illegality of the transaction, or his act was not a part of it.⁵

ILLUSTRATIONS.—A committee of a town to build a road exceeded their authority, by building a better road than they were authorized to build. *Held*, that the town was not bound to reimburse to them the cost of such road: *Keyes v. Westford*, 17 Pick. 273.

¹ *Pickering v. Demeritt*, 100 Mass. 415; *Day v. Holmes*, 103 Mass. 307; *Van Dyke v. Brown*, 8 N. J. Eq. 657; *Schrack v. McKnight*, 84 Pa. St. 30; *Corbin v. American Mills*, 27 Conn. 274; 71 Am. Dec. 63; *Williams v. Littlefield*, 12 Wend. 362; *Howard v. Tucker*, 1 Barn. & Ad. 772; *Saveland v. Green*, 36 Wis. 612.

² *Story on Agency*, sec. 349.

³ *Dodge v. Tieson*, 12 Pick. 333; *Montrou v. Jefferys*, 2 Car. & P. 113. An agent who neglects to insure cargo shipped to him as directed by the owner cannot maintain an action for a premium of insurance, although he would have been liable to the owner in damages for neglect of duty in case

the cargo had been lost: *Storer v. Eaton*, 50 Me. 219; 79 Am. Dec. 611.

⁴ *Armstrong v. Toler*, 11 Wheat. 258; *Kennett v. Chambers*, 14 How. 33; *Callagan v. Hallett*, 1 Caines, 104; *Graves v. Delaplaine*, 14 Johns. 146; *Fareira v. Gabell*, 89 Pa. St. 89; *Ward v. Van Duzer*, 2 Hall, 182; *Stebbins v. Leowolf*, 3 Cush. 137; *Trustees v. Galatian*, 4 Cow. 340; *St. John v. St. John's Church*, 15 Barb. 346.

⁵ *Armstrong v. Toler*, 11 Wheat. 258; *Greenwood v. Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Rosewarne v. Billing*, 15 C. B., N. S., 316; *Moore v. Appleton*, 26 Ala. 633; *Drummond v. Humphreys*, 39 Me. 347; *Warren v. Hewitt*, 45 Ga. 501.

CHAPTER XI.

DUTIES AND LIABILITIES OF AGENTS AND PRINCIPALS TO
THIRD PERSONS.

1. AGENTS. — (a) On Contracts; (b) For Torts.

(a) On Contracts.

- § 99. Agent to bind principal must execute authority in his name.
- § 100. Instruments under seal.
- § 101. Instruments not under seal.
- § 102. Illustrations.
- § 103. When agent personally bound — *Descriptio personæ*.
- § 104. Agent not personally liable.
- § 105. Foreign principal.
- § 106. Irresponsible principal.
- § 107. Agent liable where principal not disclosed.
- § 108. Agent may bind himself personally.
- § 109. Notice to agent not to pay over money to principal.
- § 110. Liability of agent acting without authority.

(b) For Torts.

- § 111. Agent not liable personally for torts.
- § 112. Exceptions.

2. PRINCIPALS.

- § 113. Liability of principal on agent's contracts — Law already discussed.
- § 114. Liability of principal for agent's torts.

§ 99. Agent to Bind Principal must Execute Authority in his Name.—An agent must execute his authority in the name of his principal, and not in his own.¹ This is an old rule, which, most strictly applied to the execution of sealed instruments, has in modern times been greatly relaxed even as to them.

§ 100. Instruments under Seal.—As to instruments under seal, in order to bind the principal the instrument must purport to be made and sealed in the name of the

¹ Stackpole v. Arnold, 11 Mass. 27; 87; Taylor v. Agricultural Soc., 68 6 Am. Dec. 150; Dennison v. Story, 1 Ala. 229. Or. 272; Spencer v. Field, 10 Wend.

principal.¹ In equity, however, if the agent, having authority to sign a sealed instrument for another, does so in his own name, and the principal receives the consideration, he will be bound to make good his implied promise.² The deed need not be signed with the name of the attorney at all; the name of the principal alone is sufficient to constitute a proper execution by an attorney or agent.³ Where the deed purports to be made and sealed by the agent, he will be personally liable, even though he is described as agent.⁴ But, on the other hand, where the deed purports to be the deed of the principal, executed by the agent as such, the agent is not bound, though through informality of execution or want of authority the principal is not bound.⁵ To bind the principal, no exact form of words

¹ *Inhabitants of Nobleton v. Clark*, 68 Mo. 87; 28 Am. Rep. 22; *New England Ins. Co. v. De Wolf*, 8 Pick. 56; *Stackpole v. Arnold*, 11 Mass. 27; 6 Am. Dec. 150; *Echols v. Cheney*, 28 Cal. 157; *Morrison v. Bowman*, 29 Cal. 337; *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669; *Elwell v. Shaw*, 16 Mass. 42; 8 Am. Dec. 126; *Fullam v. West Brookfield*, 9 Allen, 1; *Stone v. Wood*, 7 Cow. 452; 17 Am. Dec. 529; *Townsend v. Corning*, 23 Wend. 435; *Briggs v. Partridge*, 64 N. Y. 358; 21 Am. Rep. 617; *Lutz v. Linthicum*, 8 Pet. 165; *Stinchfield v. Little*, 1 Greenl. 231; 10 Am. Dec. 65; *Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Hancock v. Yunker*, 83 Ill. 208; *Einstein v. Holt*, 52 Mo. 340; *Grubbs v. Wiley*, 17 Miss. 29; *Webster v. Brown*, 2 Rich. 428; *City of Providence v. Miller*, 11 R. I. 272; *Townsend v. Hubbard*, 4 Hill, 351; *Clarke v. Courtney*, 5 Pet. 319; *Martin v. Flowers*, 8 Leigh, 158; *Skinner v. Gunn*, 9 Port. 305; *Fire Ins. Co. v. Doll*, 35 Md. 89; *Reed v. Latham*, 40 Conn. 452; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Harper v. Hampton*, 1 Har. & J. 622; *Heffernan v. Addams*, 7 Watts, 121; *Mears v. Morrison*, 1 Ill. 223; *Sheldon v. Dunlap*, 16 N. J. L. 245; *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771; *Savage v. Rix*, 9 N. H. 263; *Morse v. Green*, 13 N. H. 32; 38 Am. Dec. 471; *Peck v. Gardner*, 9 Hun, 704.

² *Dubois v. Delaware etc. Co.*, 4 Wend. 285; *Butler v. Kaulback*, 8 Kan. 668; *Robbins v. Butler*, 24 Ill. 387; *Devinney v. Reynolds*, 1 Watts & S. 323; *Lovejoy v. Richardson*, 68 Me. 386; *Emory v. Joice*, 70 Mo. 537; *Fouch v. Wilson*, 59 Ind. 93; *Clements v. Macheboeuf*, 92 U. S. 418; *Yerly v. Grigsby*, 9 Leigh, 387; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731.

³ *Forsyth v. Day*, 41 Me. 382; *Hunter v. Giddings*, 97 Mass. 41; 93 Am. Dec. 54; *Devinney v. Reynolds*, 1 Watts & S. 328; *Berkey v. Judd*, 22 Minn. 287. But see *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771.

⁴ *Lutz v. Linthicum*, 8 Pet. 165; *Duval v. Craig*, 2 Wheat. 45; *Fullam v. West Brookfield*, 9 Allen, 1; *Tippets v. Walker*, 4 Mass. 595; *Taft v. Brewster*, 9 Johns. 334; *Stone v. Wood*, 7 Cow. 453; 17 Am. Dec. 529; *White v. Skinner*, 13 Johns. 307; 7 Am. Dec. 381; *Kiersted v. Orange Co.*, 69 N. Y. 343; *Deming v. Bullitt*, 1 Blackf. 241; *Quigley v. De Haas*, 82 Pa. St. 267; *Hancock v. Yunker*, 83 Ill. 208; *Hutton v. Bulloch*, L. R. 9 Q. B. 572.

⁵ *Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Taylor v. Shelton*, 30 Conn. 122; *Ellis v. Pulsifer*, 4 Allen, 165. C signed his name to a sealed instrument as agent, the body of the deed being in the name of the principal (a corporation), "by their agent." *Held*,

has been declared necessary. What is necessary is, that it should appear that the agent and attorney sign as

that C was not personally liable: *Abbey v. Chase*, 6 Cush. 54. "It does not appear," said Metcalf, J., "whether the defendant had authority to bind the Hadley Falls Company, by deed or otherwise. But in the view which we take of the case, that question is immaterial. We deem it very manifest, on inspection of the instrument in suit, that it was the intention of the defendant to bind the company, and not to bind himself; and that the plaintiff must have so understood the contract. And if this had been a simple contract, executed by an authorized agent, the law would have given effect to that intention. The company, and not the defendant, would have been bound. The authorities on this point are numerous and decisive: *Northampton Bank v. Peepoon*, 11 Mass. 288; *Andrews v. Estes*, 11 Me. 270; 26 Am. Dec. 521; *New England Ins. Co. v. De Wolf*, 8 Pick. 56; *Rice v. Cove*, 22 Pick. 158; 33 Am. Dec. 724; *Bayley on Bills*, 2d Am. ed., 72, 73. But when a sealed instrument is executed by an agent or attorney, for the principal, the strict technical rule of the common law, which has never been relaxed in England or in this commonwealth, requires that it be executed in the name of the principal, in order to make it his deed: *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669. 'In such cases,' says Story, J., 'the law looks not to the interest alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity': *Clarke v. Courtney*, 5 Pet. 350; see also *Locke v. Alexander*, 1 Hawks, 416. The plaintiff's counsel, in applying this strict rule to the instrument in suit, contends that it does not bind the Hadley Falls Company, and that, as the defendant has not bound the company, he has bound himself. But in deciding whether the defendant has or has not bound himself, we need not decide whether he has or has not bound the company. For it does not necessarily follow that a contract made by an authorized agent, which does not bind the principal, becomes the agent's contract, and makes him

answerable if it is not performed. This depends upon the legal effect of the terms of the contract. If the agent employs such terms as legally import an undertaking by the principal only, the contract is the principal's, and he alone is bound by it. But if the terms of the contract legally import a personal undertaking of the agent, and not of the principal, then it is the contract of the agent, and he alone is answerable for a breach of it. So when one who has no authority to act as another's agent assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contains apt words to bind him personally: *Stetson v. Patten*, 2 Greenl. 358; 11 Am. Dec. 111; *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146. *Delius v. Cawthorn*, 2 Dev. 90. The only remedy against him in this commonwealth is an action on the case for falsely assuming authority to act as agent. See also 13 Ad. & E., N. R., 744. These principles lead us to the conclusion that the ruling at the trial of this case was wrong, and that the defendant is not chargeable in the present action. The instrument sued on purports to be, and was intended to be a deed *inter partes*, namely, the Hadley Falls Company and the plaintiff. The defendant, as agent of the company, signed his own name, merely adding thereto the word 'agent,' and affixed his own seal; the plaintiff signed his name, and affixed his seal; and these acts were done as the acts of the parties before named. It seems to us impossible to charge the defendant, on this instrument, as on a contract made by him with the plaintiff. If any words had been inserted in the instrument expressing the defendant's personal undertaking to fulfill the contract on behalf of the company, he would have been personally bound, although the instrument was prepared as a deed *inter partes*: *Salter v. Kidgley*, Carth. 76; *Holt*, 210. But no such words are found in the instrument."

agent or attorney for his principal.¹ The most proper mode—and one open to no attack—would be to sign the principal's name, adding, "by his agent, A B." But other forms have in adjudged cases been declared sufficient to bind the principal; e. g., "For A B" (principal), "C D" (agent).² "Know that I, M., for myself, and as attorney for B, by his duly authorized letters of attorney."³ "In witness, the said association, by J. S., its president, has hereunto set its seal, and the said J. S., president as aforesaid, has hereunto set his hand." Signed, "J. S., President."⁴ So it has been held that a deed signed in the name alone of the attorney does not bind the principal, although in the body of the instrument it is stated that it is the agreement of the principal, by A B, his agent, and that A B, as attorney of the principal, has set his hand and seal.⁵ And a deed which in the granting part uses the name of the agent is not made the principal's by being signed "C D," attorney to "A B."⁶ And the same general rule applies where a deed is to be made to another through an agent. The deed must be made to and in the name of the principal. If the conveyance be made simply to the agent, the principal will take nothing; though in equity he would be held a trustee for the principal.⁷

ILLUSTRATIONS. — A deed was in form: "I, H., for myself, and as attorney for T., and G., wife of T., by their letters of attorney under their hands and seals, in consideration of \$1,850 to us paid by L., do sell and convey to L. and his heirs forever the following," etc. "And we, the said T. and G., do covenant with said L. that we are rightfully seised," etc. "In witness

¹ *Hunter v. Miller*, 6 B. Mon. 612; *Martin v. Almond*, 25 Mo. 313; *Mussey v. Scott*, 7 Cush. 216; 54 Am. Dec. 719; *Wilburn v. Larkin*, 3 Blackf. 55.

² *Wharton on Agency*, sec. 289, citing cases.

³ *McClure v. Herring*, *post*.

⁴ *Murphy v. Welch*, 128 Mass. 489.

⁵ *Townsend v. Corning*, 23 Wend. 435; *Fowler v. Shearer*, 7 Mass. 19.

⁶ *Squier v. Norris*, 1 Lans. 282; *Copeland v. Insurance Co.*, 6 Pick. 198; *Martin v. Flowers*, 8 Leigh, 158; *Bogart v. De Bussy*, 6 Johns. 94; *Tippets v. Walker*, 4 Mass. 595; but see *Tidd v. Rines*, 26 Minn. 201.

⁷ *Story on Agency*, sec. 151, citing *Clarke v. Courtney*, 5 Pct. 319; *Fox v. Frith*, 10 Mees. & W. 131.

whereof, I, H., in my own right, have hereunto set my hand and seal, and as attorney for said T. and G., have hereunto set their hands and seals." To this deed were subscribed the names of H., and of T. and G. by H., their attorney in fact, with seals severally affixed to all the names. *Held*, that the deed was sufficient in form as the deed of T. and G.: *McClure v. Herring*, 70 Mo. 18; 35 Am. Rep. 404.

§ 101. **Instruments not under Seal.**—As to writings not under seal, the rule is less strict, and it may be laid down that if the name of the principal appears in such an instrument, and the intention on the whole is to bind him, he will be bound though the agent sign only his own name;¹ especially is this the case as to commercial contracts, negotiable paper, and the like, the modern rule as to these being, that if from the whole instrument it can be collected that the intention was to bind the principal, this construction will be adopted, though the agent may not have used apt words to do so.²

§ 102. **Illustrations.**—Thus negotiable paper in the following form has been held binding on the principal, e. g.: "I promise to pay J. S. or order," signed "pro C D, A B."³ "We jointly and severally promise," signed "A and B for C."⁴ A note signed "A B," agent for "C D."⁵

¹ *New England Ins. Co. v. De Wolf*, 8 Pick. 56; *Robertson v. Pope*, 1 Rich. 501; 44 Am. Dec. 267; *Farmers' Bank v. City Bank*, 1 Doug. (Mich.) 458; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Townsend v. Hubbard*, 4 Hill, 351; *Pinckney v. Hagadorn*, 1 Duer, 89; 14 N. Y. 590; *Evans v. Wells*, 22 Wend. 324; *Northwestern Distilling Co. v. Brant*, 69 Ill. 658; 18 Am. Rep. 631; *Douglass v. Branch Bank of Mobile*, 19 Ala. 659; *Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280. In *Webb v. Burke*, 5 B. Mon. 51, it is said to be well settled that if in the body of a writing A B's agent binds C D, and then signs it "A B, agent for C D," the writing will bind C D.

² *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Pentz v. Stanton*, 10 Wend. 271; 25 Am. Dec. 558; *Stanton v. Camp*, 4 Barb. 274;

Rice v. Gove, 22 Pick. 158; 33 Am. Dec. 724; *King v. Handy*, 2 Ill. App. 212; *Harkins v. Edwards*, 1 Iowa, 429; *Means v. Swormstedt*, 32 Ind. 87; 2 Am. Rep. 330; *Babcock v. Beman*, 11 N. Y. 200; *Key v. Parham*, 6 Har. & J. 418; *Lacy v. Dubuque Co.*, 43 Iowa, 510; *Mott v. Hicks*, 1 Cow. 513; 13 Am. Dec. 550; *Merchants' Bank v. Hayes*, 7 Hun, 530; *Roberts v. Button*, 14 Vt. 195; *Mann v. Chandler*, 9 Mass. 335; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Davis v. Henderson*, 25 Miss. 549; 69 Am. Dec. 229; *Halle v. Peirce*, 32 Md. 327; 3 Am. Rep. 139.

³ *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160.

⁴ *Rice v. Gove*, 22 Pick. 158; 33 Am. Dec. 724.

⁵ *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146.

"By authority from B, I hereby guarantee the payment of this note," signed by the agent in his own name.¹ "I undertake on behalf of Messrs. E. & Co. to pay."² "S. W. P. for A. and R."³ "W. S. for himself and G. L."⁴ "H. M. Moore, P. D. L. Co."⁵ "T. M., agent for P. M."⁶ "We promise to pay," signed "S., secy.," and sealed with a corporate seal.⁷ "A. B., agent of — Co."⁸ A bank-check with "Ætna Mills" printed on the margin, and signed "F., treasurer."⁹ A note with, in the body, the words, "We promise," and signed "V., for N. B. & Co."¹⁰ A note drawn to "C. W. Smith, treasurer of the Indianapolis Brick Co."¹¹

¹ *New England Ins. Co. v. De Wolf*, 8 Pick. 56.

² *Townman v. Jones*, 7 Q. B. 103.

³ *King v. Handy*, 2 Ill. App. 212.

⁴ *Oleott v. Little*, 9 N. H. 259.

⁵ *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510.

⁶ *Hill v. Miller*, 76 N. Y. 32.

⁷ *Means v. Swormstedt*, 32 Ind. 87; 2 Am. Rep. 330; *Houghton v. First National Bank*, 26 Wis. 663; 7 Am. Rep. 107.

⁸ *Hovey v. Magill*, 2 Conn. 680.

⁹ *Carpenter v. Farnsworth*, 106 Mass. 561; 8 Am. Rep. 360. In this case

the court said: "The case is not distinguished from those in which similar instruments have been held by this court to be the contracts of the principal only. The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intentions of the parties. In *Tripp v. Swanzy Paper Co.*, 13 Pick. 291, a draft not naming the principal otherwise than by concluding, 'and charge the same to the Swanzy Paper Company, yours respectfully, Joseph Hooper, agent,' was held to be the draft of the company. In *Fuller v. Hooper*, 3 Gray, 334, a draft with the words, 'Pompton Iron Works,' printed in the margin, and concluding, 'which place to the account of Pompton Iron Works, W. Burtt, agent,' was held to bind the proprietor of the Pompton Iron Works; and in *Bank of British North America v. Hooper*, 5 Gray, 567, 66 Am. Dec. 390, in which

a draft concluding, 'and charge the same to account of proprietors Pembroke Iron Works, your humble servant, Joseph Barrell,' without otherwise naming a principal or disclosing the signer's agency, was held to bind him only, it was said by the court that in *Fuller v. Hooper* the words 'Pompton Iron Works,' in the margin of the draft, fully disclosed the principal, and that the draft was drawn on his behalf. So in *Slawson v. Loring*, 5 Allen, 340, 343, in which a draft having the words, 'Office of Portage Lake Manufacturing Company, Hancock, Michigan,' printed at the top, was signed 'I. R. Jackson, agent,' Chief Justice Bigelow, said: 'No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon.' The instrument in question, therefore, binds the corporation, and not its treasurer personally."

¹⁰ *Cook v. Sanford*, 3 Dana, 237.

¹¹ *Vater v. Lewis*, 36 Ind. 288; 10 Am. Rep. 29. In this case the court humorously observed: "To say that the contract was not with the company, but with Smith individually, and that his designation as treasurer was merely a description of him, so that he, being one only of all the great family of Smiths, might be known and identified as the payee of the note, would be a perversion of the evident intent of the parties." And see *Babeock v. Beaman*, 1 E. D. Smith, 593.

ILLUSTRATIONS.—A note was in this form: "\$23.00. Lee, April 26, 1858. On demand, I, as treasurer of the Congregational Society, or my successors in office, promise to pay A. B., or order, twenty-three dollars, value received, with interest. S. S. R., treasurer." *Held*, the note of the society: *Barlow v. Lee Cong. Soc.*, 8 Allen, 460. A promissory note purporting to be made by the inhabitants of School District No. 5, in a town, was signed "A. B., treasurer of District No. 5." *Held*, the promise of the district: *Whitney v. Stow*, 111 Mass. 368. A bill of exchange, stamped in the margin, "Pompton Iron Works," and concluded thus, "Which place to account of Pompton Iron Works, W. Burt, agent." *Held*, the bill of the Pompton Iron Works, and is binding on the person carrying on business in that name, if Burt was his authorized agent: *Fuller v. Hooper*, 3 Gray, 334. A draft was headed "New England Agency of the Pennsylvania Fire Insurance Company," having the words "Foster and Cole, General Agents for the New England States," printed in the margin, and appearing on its face to be drawn upon said insurance company in payment of a claim against it. *Held*, the draft of the company, and not of Foster and Cole, although it is signed by them in their own names: *Chipman v. Foster*, 119 Mass. 189. A written agreement purporting to be between T., agent of the steamship A., of the one part, and G. of the other part, and signed by "T., agent," and G., provided that the party of the first part let to the party of the second part a certain space on the steamship for the conveyance of cattle; that the steamship should put on board a condenser capable of supplying the cattle with water; that the captain was to allow his officers and crew to render assistance in case of emergency, without liability to the ship-owner; that the attendants of the cattle were to have passages free of charge, but without liability to the ship-owner; and that the steamship was to have a lien on the cattle for the freight. *Held*, that the agreement was the contract of the steamship and her owners, and not of T. personally: *Goodenough v. Thayer*, 132 Mass. 152. The following agreement, "I have, this ninth day of January, 1817, hired of A the following slaves for the use of B, and agree, on behalf of said B., to give eighty dollars as wages for each of the said negroes," etc., and signed "C." *Held*, not to bind C personally: *Key v. Parnham*, 6 Har. & J. 418. Articles were purchased for a manufacturing company, of which A was the agent, who gave a due-bill in this form: "Due E. M., seventy-eight dollars, value received. A, agent for the manufacturing company." *Held*, that A was not personally liable thereon: *McCall v. Clayton*, Busb. 422. A contracted with B for grain, and the price of the grain was to be paid by C, who signed the agreement for A thus: "A, by his agent C." *Held*, that it was the contract of

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the principal: *Thompson v. Chouteau*, 12 Mo. 488. A bond was signed "A B, for C D," and the name of A B was not mentioned in the body of the bond, which only purported to bind C D. *Held*, in an action of covenant on the bond against A B, that he executed the bond as agent only, and that the plaintiff could not recover: *Grubbs v. Wiley*, 9 Smedes & M. 29. II. contracted, in writing, as the agent of K., for the purchase of goods to be delivered at a future time to him or to his principal. It was expressly stated in the contract that II. was contracting as an agent, the name of his principal was disclosed, and there was an acknowledgment of the receipt of one dollar to bind the principal. K. refused to receive the goods when tendered. *Held*, that II. was not personally liable to the vendor upon the contract: *McClellan v. Hall*, 33 Md. 293. A bill of exchange was headed with the name of a banking office, and when paid was to be charged to that office, and was signed by a person as agent. *Held*, that the agent was not personally responsible thereon: *Sayre v. Nichols*, 7 Cal. 535. A bill of exchange headed, "Office of the A B Co., and concluding, "Charge same to account of A B Co., X, Pres't, Y, Sec'y, *held* to be the bill of the company: *Hitchcock v. Buchanan*, 105 U. S. 416. A lease recites that it is made by "M., agent of D.," and is signed in the same way. *Held*, that D., and not M., is bound: *Arery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680. A check signed by A, "V. Pres't," and by C, "Sec'y," was given to a party who knew it to be a check of the corporation of which A and C were respectively vice-president and secretary. *Held*, not to bind A and C personally: *Metcalf v. Williams*, 104 U. S. 93. An order drawn upon E., treasurer of the N. & N. W. R. R. Co., with a direction "to change to February estimates," was accepted by his writing upon it, "Accepted, payable on return of March estimates. E., Treas." *Held*, that E. was not personally liable: *Amison v. Ewing*, 2 Cold. 366. James Harter and S. M. Stranahan were sued as joint makers with the Ocean Mining Company of a note, set forth in the complaint, in the following form: "Three months after date, the Ocean Mining Company promise to pay to W. G. Bright, or order, one thousand dollars, for value received, with interest at the rate of two per cent per month. (Signed) James Harter, trustee, S. N. Stranahan." Judgment by default was rendered against the company and H. and S. *Held*, that this judgment was erroneous; that the instrument itself showed the intention of H. and S. to bind the company, and not themselves, and that they were not personally liable: *Shaver v. Ocean M. Co.*, 21 Cal. 45. Three persons holding land as trustees of an association composed of themselves and several other persons, called "the B. Company," entered into two contracts with the plaintiff, which by the articles of

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the trust they were authorized to make on behalf of the shareholders. Both of these contracts stated on their face that they were made by the trustees "as trustees of the B. Company," and were both signed by these persons "as trustees of the same company." By the first contract the plaintiff was to construct a wharf "for said company on their land," on the line of a dock or canal, "to be excavated for said company"; and "payments shall be made" at stated times. The second contract recited that the plaintiff agreed to construct a canal or dock "for said company on the company's land"; and the provision as to payments was substantially like that in the first contract. *Held*, that it was intended by these contracts to bind the company, and not the trustees personally, and that they were sufficient in form for that purpose, and that the addition of seals, being unnecessary, might be disregarded as surplusage: *Cook v. Gray*, 133 Mass. 106.

§ 103. When Agent Personally Bound — Descriptive Personæ.—But there are cases which hold that where in the body of the instrument there is nothing to show an intention to bind a principal, the mere signing "as agent" for a described principal will not prevent it from being a personal contract of the agent.¹ And where no idea of agency appears on the face of the instrument,—the contract being signed by the agent, in his own name, and the principal not being mentioned,—the principal is not bound, and the agent is.² And the agent is bound even

¹ *Quigley v. De Haas*, 82 Pa. St. 267; *Robinson v. Bank*, 44 Ohio St. 441; *Haffner v. Brownell*, 70 Iowa, 591; *Williams v. Robbins*, 16 Gray, 77; 77 Am. Dec. 396; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *McClure v. Livermore*, 78 Me. 390; *Exchange Bank v. Lewis Co.*, 28 W. Va. 273. An agent signed a bill of exchange, "T. R. T., agent for S. T." There was nothing in the body of the bill which hinted at a principal. *Held*, that the agent was bound: *Tannatt v. Rocky Mountain Bank*, 1 Col. 278; 9 Am. Rep. 156. A note was signed "For B. Ayres, W. B. Ayres." *Held*, that W. B. Ayres was bound: *Ofutt v. Ayres*, 7 T. B. Mon. 356. A promissory note in the body read "we promise to pay," and was signed "G. M.,

treasurer of Mechanics' Falls Dairying Ass'n." *Held*, that it bound G. M.: *Mellen v. Moore*, 68 Me. 390; 28 Am. Rep. 77. In this case the court held that there was no difference between the words "I promise" and "we promise," in the body of an instrument, so far as a personal liability was concerned. In the body of a bond the language used was "I promise to pay," no name being mentioned; and it was signed "H. S. L., for C. C., president of the Chester Mica and Porcelain Co." *Held*, that the agent was individually liable: *Bryson v. Lucas*, 84 N. C. 680; 37 Am. Rep. 635.

² *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Squier v. Norris*, 1 Lans. 282; *Galusha v.*

though he is described in the contract as agent, if he makes the contract in his own name.¹ And this is so even where a note is signed as "agent," but for whom is not shown. The word "agent" in such cases is regarded as mere *descriptio personæ*.² The courts think it better that the contract should be enforced as it reads, than to permit evidence to be given that somebody not mentioned at all was really bound. "When a man has deliberately said in writing, 'I promise to pay,' and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract and undertake to prove that he did not actually mean 'I promise,' but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment. It is better that a careless or ignorant agent should some-

Hitchcock, 29 Barb. 193; Minard v. Mead, 7 Wend. 68; Bank of British North America v. Hooper, 5 Gray. 567; 63 Am. Dec. 390; Anderton v. Shoup, 17 Ohio St. 128; Williams v. Robbins, 16 Gray, 77; 77 Am. Dec. 396; De Witt v. Walton, 9 N. Y. 571; Taber v. Cannon, 8 Mct. 456; Snelling v. Howard, 51 N. Y. 373; Einstein v. Holt, 52 Mo. 340; Bradlee v. Boston Mfg. Co., 16 Pick. 347; Bank of Rochester v. Monteath, 1 Denio, 402; 43 Am. Dec. 681.

¹ Stone v. Wood, 7 Cow. 453; 17 Am. Dec. 529; Hancock v. Fairfield, 30 Me. 299; Hall v. Bradbury, 40 Conn. 32; Graham v. Campbell, 56 Ga. 258; Toledo Agricultural Works v. Heisser, 51 Mo. 128; Kenyon v. Williams, 19 Ind. 45; Arnold v. Sprague, 34 Vt. 409; Anderson v. Pearce, 36 Ark. 293; 38 Am. Rep. 39; Sturdivant v. Hull, 59 Me. 172; 8 Am. Rep. 409; Henderson v. Martin, 19 Ark. 447; 70 Am. Dec. 606.

² Pentz v. Stanton, 10 Wend. 271; 25 Am. Dec. 558; Collins v. Buckeye Ins. Co., 17 Ohio St. 215; 93 Am. Dec. 612; Woodbury v. Blair, 18 Iowa, 572; Bickford v. Bank, 42 Ill. 238; 89 Am. Dec. 436; Rathbun v. Budlong, 15 Johns. 1; Rand v. Hale, 3 W. Va. 495; 100 Am.

Dec. 761; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Merchants' Bank v. Hayes, 7 Hun, 530; Hills v. Bannister, 8 Cow. 31; Fisk v. Eldridge, 12 Gray, 474; Slawson v. Loring, 5 Allen, 310; 81 Am. Dec. 750; Towne v. Rice, 122 Mass. 67; Winsor v. Griggs, 5 Cush. 210; Hall v. Bradbury, 40 Conn. 32; Price v. Taylor, 5 Hurl. & N. 549; City of Detroit v. Jackson, 1 Doug. (Mich.) 115; Powers v. Briggs, 79 Ill. 493; 22 Am. Rep. 175; Burlingame v. Brewster, 79 Ill. 515; 22 Am. Rep. 177; Chadsey v. McCreery, 27 Ill. 253; Drake v. Flewellen, 33 Ala. 106; Fowler v. Atkinson, 6 Minn. 578. A. C. makes a promissory note which he signs "A. C., agent." This binds A. C. only; Williams v. Robbins, 16 Gray, 77; 77 Am. Dec. 396. H. signs a note "D. H., agent for the churchman." H., and not the churchman, is bound: De Witt v. Walton, 9 N. Y. 571. But see Mott v. Hicks, 1 Cow. 513; Green v. Skeel, 2 Hun, 487; Bank of Genesee v. Patchin Bank, 19 N. Y. 317. And *aliter* where the agent has been in the habit of signing notes which have been regularly paid by the principal: Hovey v. Magill, 2 Conn. 680; see 15 Alb. L. J. 409; 16 Alb. L. J. 117, 345.

times pay for his principal than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony."¹ The word "agent" after the name of the drawer of a bill of exchange does not necessarily relieve him from personal liability, when there is nothing in the bill to indicate his principal.² The addition, "Vestryman, Grace Church," to each of the names attached to a note does not make it anything but the note of the individuals signing it, if it does not purport to bind the corporation.³

ILLUSTRATIONS.—A promissory note was indorsed, "L. R., receiver." *Held*, to bind L. R. personally: *Towne v. Rice*, 122 Mass. 67. A lease was to "C., treasurer of the Eagle Lodge," and signed by him, "C., treas." *Held*, to bind C. personally: *Seaver v. Coburn*, 10 Cush. 324. A submission to arbitration was signed "G. G., agent." *Held*, to bind G. G. to perform the award; the name of the principal not being known to the other party: *Winsor v. Griggs*, 5 Cush. 210. In a promissory note no principal is mentioned, and it is signed "A B, agt." *Held*, to bind A B only: *Williams v. Robbins*, 16 Gray, 77; 77 Am. Dec. 396. A note was in this form: "We, the prudential committee for and in behalf of the Baptist Church in Lee," etc., signed by the makers, without addition to their names. *Held*, to bind the signers personally: *Morell v. Coddington*, 4 Allen, 403. A contract signed by G. and C. individually, employing G. as treasurer of the I. Company, and reciting that it was an "understanding had with G. as between himself and C., president and representing the I. Company." *Held*, to bind C. personally: *Guernsey v. Cook*, 117 Mass. 548. In an action upon the note, "Sixty days after date, we promise to pay to the order of B. \$342.25, at S. B. of P., value received," (signed) "W. S., president Blannerhassett Oil Co.," (indorsed) "W. H. H., treasurer,"—*held*, that S. and H. were personally liable thereon: *Scott v. Baker*, 3 W. Va. 285. A paper acknowledging receipt of five hundred dollars, to be used to buy Spencer rifles for Company I, Forty-ninth Regiment, Missouri Volunteers, said money to be returned as soon as the county bounty is paid to said company," and signed by B, "Captain Forty-ninth Regiment, Missouri Volunteers, Commanding Post," *held*, to create a liability personal, and not as agent, an irresponsible principal

¹ *Sturdivant v. Hull*, 59 Me. 172; 8 Am. Rep. 409. ³ *Tilden v. Barnard*, 43 Mich. 376; 33 Am. Rep. 197.

² *Bank v. Cook*, 33 Ohio St. 442.

being disclosed in such military company, and not to be explainable by parol evidence: *Blakely v. Bennecke*, 59 Mo. 193. A promissory note in form, "We promise to pay," given by trustees of an incorporated lodge for the debt of the lodge, and signed "A, B, C, Trustees Perry Lodge," held, the individual note of the signers, and not the note of the lodge, and it cannot be shown by parol that it was intended to be the note of the lodge:¹ *Williams v. Lafayette Bank*, 83 Ind. 237.

§ 104. Agent not Personally Liable.—An agent acting within his authority, and making a contract in the name of his principal, binds the latter, and incurs no personal liability.² If in the body of a note it appear that the note is the note of the principal, or made by the signer for and as agent of the principal, it is the note of the latter, even though the words "agent for," or the like, are not added to the signature.³ Where one contracts with or sells goods to an agent of a known principal, the principal, and not the agent, is liable on the contract for the price,⁴ unless it is clear that the vendor sold upon the credit of the agent alone.⁵ Where an agent does not dis-

¹ A promissory note signed by A as president of a certain named corporation, and by B as "secretary *pro tem.*," is the note of the corporation, although in its body it says "we promise to pay," etc.: *Farmers' and Mechanics' Bank v. Colby*, 64 Cal. 352. An instrument signed "B, agent," may be deemed the contract of the principal, when, from the body of the instrument, such construction can fairly be put upon it: *Bradstreet v. Baker*, 14 R. I. 546.

² *Owen v. Gooch*, 2 Esp. 567; *Tiller v. Spradley*, 39 Ga. 35; *McClernan v. Hall*, 33 Md. 293; *Story on Agency*, sec. 261; *Oelricks v. Ford*, 23 How. 49; *Pitman v. Kintner*, 5 Blackf. 250; 33 Am. Dec. 469; *Simonds v. Heard*, 23 Pick. 120; 34 Am. Dec. 41; *Hall v. Huntton*, 17 Vt. 244; 44 Am. Dec. 332; *Davis v. Burnett*, 4 Jones, 71; 67 Am. Dec. 263; *Whitney v. Wyman*, 101 U. S. 392; *Maury v. Ranger*, 38 La. Ann. 485; 58 Am. Rep. 197; *Piercy v. Hedrick*, 2 W. Va. 458; 98 Am. Dec. 774. "The general principle is, that an agent is not liable to be

sued upon contracts made by him on behalf of his principal if the name of his principal is disclosed and made known to the person contracted with at the time of entering into the contract": *Rathbon v. Budlong*, 15 Johns. 1.

³ *Haskell v. Cornish*, 13 Cal. 45.

⁴ *Meeker v. Claghorn*, 44 N. Y. 349. H., being insolvent, carried on business in the name of C. K., who had no interest in the profits, but allowed his name to be used. F. sold to H. goods, the purchase being made in the name of C. K., and the bill was made out in his name. Held, that C. K., and not H., was liable: *Ferris v. Kilmer*, 48 N. Y. 302.

⁵ *Ferris v. Kilmer*, 48 N. Y. 303; *Butler v. Evening Mail Ass'n*, 61 N. Y. 634; *Meeker v. Claghorn*, 44 N. Y. 349. "No rule of law is better ascertained, or stands upon a stronger foundation, than this: that where an agent names his principal, the principal is responsible, not the agent. But for the application of that rule the agent

close his character or his principal, but the other party actually knows both at the time, the agent is not bound by the contract, unless the contract is such as would bind him at all events.¹ Where one acting professedly as the agent of B contracts with C for his services, C cannot recover, in an action against the agent, without showing *prima facie* a want of authority in the agent to bind B. In such case the *onus* lies on C to show the want of authority in the agent.² A railroad freight agent cannot be made a defendant in an action for his refusal to deliver up freight until certain charges have been paid, he not claiming to control the property except as the agent of the company.³ A contract is void when it is not binding upon the principal for want of authority in the agent to make it, and not binding on the agent for want of apt words to charge him personally.⁴

ILLUSTRATIONS. — R., having a possessory interest in certain premises which had been sold under a foreclosure decree, employed M. to manage the property and receive all its proceeds, and pay them over in certain fixed proportions to R. and S. *Held*, that M. was a mere agent of R., and not a "tenant in possession," and therefore not liable to the purchaser at the sale for the rents and profits: *Shores v. Scott River Co.*, 21 Cal. 135. Agents were employed by importers to pass goods through the custom-house; they were known by the officers of the customs to be agents; they removed certain goods reported to be free of duty and sent them to their principals; afterwards it was discovered that they were liable to duty, and an action for the

must name his principal as the person to be responsible. In the common case of an upholsterer employed to furnish a house, dealing himself in only one branch of business, he applies to other persons to furnish those articles in which he does not deal. Those persons know the house is mine. That is expressly stated to them. But it does not follow that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case: A person instructs an attorney to bring an action, who employs his own stationer, generally

employed by him. The client has nothing to do with the stationer if the attorney becomes insolvent. The client pays the attorney. The stationer therefore has no remedy against the client": Lord Erskine, in *Ex parte Hartop*, 12 Ves. 352.

¹ *Chase v. Debolt*, 7 Ill. 371; *Warren v. Dickson*, 27 Ill. 115; *Robeson v. Chapman*, 6 Ind. 352.

² *Plumb v. Milk*, 19 Barb. 74.

³ *McDougall v. Travis*, 24 Hun, 590.

⁴ *Hall v. Crandall*, 29 Cal. 567; 89 Am. Dec. 64.

duty was brought against the agents. *Held*, that they were not liable: *United States v. Bevan*, Crabbe, 324. A commercial firm publishes a notice in a newspaper that a certain person will act as their agent. Such person advertises for the purchase of cotton in the name of the firm. *Held*, that it will be presumed that his purchases are made for the firm: *Hamilton v. Eimer*, 20 La. Ann. 391. A, as the attorney in fact of B, receives money in which C has the beneficiary interest. C cannot maintain an action against A for the money so received, but must sue B, the principal: *Stephens v. Baker*, 7 N. J. L. 1. Defendant took a telegram to the plaintiff, a surgeon in the city of New York, from the family physician of the defendant's brother in Connecticut, in pursuance of which telegram the plaintiff went to Connecticut and performed a surgical operation upon the defendant's brother, the defendant accompanying the plaintiff to Connecticut and paying his railroad fares, but not saying or doing anything beyond the duties of an agent. *Held*, not liable for the services performed by the plaintiff for his brother: *Buck v. Amidon*, 41 How. Pr. 370.

§ 105. **Foreign Principal.**—In England, in the case of an agent of a foreign principal, the rule was that the credit was presumed to be given to the agent even where the principal was known.¹ The American courts, after some hesitancy, refused to apply this principle when the principal was simply a "foreigner" in the sense of residing in another state of the Union.² And the well-established doctrine at the present day, both in England³ and America, is, that the agent of a foreign principal is not, as matter of law, personally liable, but it is a question of fact for the jury, to be decided on the terms of the contract and the surrounding circumstances.⁴

¹ *Thomson v. Davenport*, 9 Barn. & C. 78; *Story on Agency*, sec. 268; *New Castle Mfg. Co. v. Red River R. R. Co.*, 1 Rob. (La.) 145; 36 Am. Dec. 686; *McKenzie v. Nevius*, 22 Me. 138; 38 Am. Dec. 291; except where the contract provided that the agent should not be bound: *Ogleby v. Yglesias*, 1 El. B. & E. 930; *Pederson v. Lotinga*, 28 L. T. Rep. 267.

² *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Kirkpatrick v.*

Stainer, 22 Wend. 254; *Vawter v. Baker*, 23 Ind. 63.

³ *Green v. Kopke*, 18 Com. B. 549; *Armstrong v. Stokes*, L. R. 7 Q. B. 603; *Mahony v. Kekule*, 14 Com. B. 390.

⁴ *Oelricks v. Ford*, 23 How. 49; *Rogers v. March*, 33 Me. 106; *Goldsmith v. Manheim*, 109 Mass. 187. A contract was entered into in New York for the sale of stone by the agent of A. F., who lived in New Brunswick.

§ 106. **Irresponsible Principal.**—Where the agent acts for an irresponsible principal,—that is to say, a

It was signed "A. F., by K., agent." *Held*, that K. was not bound: *Bray v. Kottell*, 1 Allen, 80. The opinion of Bigelow, C. J., in this case, contains a full statement of the present accepted law as to foreign principals. "This action is brought to recover damages for a breach of a written contract of affreightment entered into by the defendants in behalf of one Charles D. Archibald, doing business under the name and style of the Albert Free-stone Quarries, and executed by signing the same with the business name of their principal by themselves as agents. The only question in the case is, whether the defendants can be held liable on this contract. The plaintiff does not controvert the general rule of law, that an agent is not personally responsible upon an instrument executed in the name of his principal. But he rests his claim against the defendants upon the ground that the present case falls within a recognized exception to the rule, because the defendants acted, in making the contract, in behalf of a foreign principal, resident 'beyond seas.' It is certainly true that some of the earlier English cases seem to sanction the doctrine that where an agent acts for a foreign principal, the presumption is that credit is given exclusively to the agent, and he only is liable on contracts entered into in the name and on behalf of his principal: *Gonzales v. Sladen*, Bull. N. P. 130; *De Caillon v. L'Aigle*, 1 Bos. & P. 368; *Thomson v. Davenport*, 9 Barn. & C. 84; *Smyth v. Anderson*, 7 Com. B. 21. The same doctrine is stated in *Paley on Agency*, 4th Am. ed., 248, 2 Livermore on *Agency*, 249, and especially in *Story on Agency*, secs. 268, 290, where it is enunciated as a general rule, that agents acting for merchants residing in a foreign country are held personally liable on all contracts made by them for their employers, and this without any distinction whether they describe themselves in the contract as agents or not. We are inclined to think that a careful examination of the cases which are cited in support

of this supposed rule will show that this statement is altogether too broad and comprehensive. Certain it is, that if it ever was received as a correct exposition of the law, it has been essentially modified by the more recently adjudged cases. It doubtless had its origin in a custom or usage of trade existing in England, by which the domestic factor or agent was deemed to be the contracting party to whom credit was exclusively given; and it was confined to cases where the claim against the agent was for goods sold, and was not extended to written instruments. But it is going quite too far to say that this usage or custom is so ingrafted into the common law as to become a fixed and established rule, creating a presumption in all cases that the agent is exclusively liable, to the entire exoneration of his employer. The more reasonable and correct doctrine is, that when goods are sold to a domestic agent, or a contract is made by him, the fact that he acts for a foreign principal is evidence only that the agent, and not the principal, is liable. It is in reality in all cases a question to whom credit was in fact given. Where goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar, and to process for the immediate enforcement of debt, rather than to a principal residing abroad, under a different system of laws, and beyond the jurisdiction of the domestic forum. But even in such a case, the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit, and is liable to be controlled by other facts. So in the case of a written contract: it depends on the intention of the parties. But this, as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circum-

principal against whom the creditor cannot legally proceed,—the agent will be personally liable, even though he contract as agent for a known and described principal.¹

§ 107. Agent Liable where Principal not Disclosed.—

An agent who does not disclose the fact that he is acting for another is liable personally on contracts he makes

stance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent. But where the terms of the contract are clear and unambiguous, it must be deemed the final repository of the intention of the parties; and its construction and legal effect cannot be varied or changed by any reference to facts or circumstances affecting the convenience of the parties, or the reasonableness of the contract into which they have entered. In such a case, therefore, it makes no difference whether the principal is a foreigner or not. If by the language of the contract the agent, and not the principal, is bound, such must be its construction; and, on the other hand, if it clearly binds the principal, and is in form a contract with him only, the agent must be exonerated without regard to the fact that the principal is resident in a foreign country. This rule can work no hardship, because parties can in all cases make their contracts in such form as to bind those to whom they intended to give credit: *Mahony v. Kekulé*, 14 Com. B. 390; *Green v. Kopke*, 18 Com. B. 549; *Lennard v. Robinson*, 5 El. & B. 125; *Kirkpatrick v. Stainer*, 22 Wend. 244; 2 Kent's Com., 6th ed., 631, note; *Paley on Agency*, 4th Am. ed., 248, note. These principles are decisive of the case at bar. The written contract on which the plaintiff relies contains no words from which any intent to bind the defendants can be inferred. On the contrary, it is executed in the precise form required by law to bind the principal only and to exonerate the agent. The name under which the principal conducted his business

is signed by the defendants as his agents. It would have been open to more question if the defendants had signed their own names for their principal; but the contract is executed by the agents in the precise and technical form in which, by the strictest rule of law, it should be signed in order to bind the principal only: *Story on Agency*, sec. 153. There can be no doubt that if the principal resided in this country he alone could have been sued on the contract. In like manner, he is responsible, although a foreigner, because he is the sole party to it, and there is nothing to control the intent manifested by this mode of executing the contract. The defendants are in no sense parties to it, and are not liable in this action for damages occasioned by the neglect of their principal to comply with its terms." On a contract of affreightment executed by a foreign agent, but disclosing the fact of the agency and the name of the principal, the agent is not personally liable: *Maury v. Ranger*, 38 Aa. Ann. 485; 58 Am. Rep. 197.

¹ *Story on Agency*, sec. 280-290; *Thacher v. Dinsmore*, 5 Mass. 299; 4 Am. Dec. 61; *Sumner v. Williams*, 8 Mass. 162; 5 Am. Dec. 83; *Roberts v. Button*, 14 Vt. 195; *Blakely v. Bennecke*, 59 Mo. 193; *Tassey v. Church*, 4 Watts & S. 141; 39 Am. Dec. 65. A signed a note "as guardian of D." Held, that A was personally liable. "As an administrator," said the court, "cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward. Unless, therefore, the defendant is liable to pay this note, the plaintiff has no remedy": *Forster v. Fuller*, 6 Mass. 59; 4 Am. Dec. 87.

with others.¹ When one purchases property, he binds himself, unless he discloses a principal whom he can and does bind.² The duty is upon the agent, if he would avoid personal liability, to disclose his agency, not upon others to discover it.³ And the agent is liable, although the person he deals with knows he is an agent, but does not know who his principal is.⁴ An agent of an unincorporated company is not discharged from his liability to pay for work done for him by one whom he has employed without disclosing his agency, by the fact that after the work was performed the laborer was informed by another person of the agency, and thereupon altered the entry in his book of accounts by substituting the name of the company for that of the agent, if he never attempted to enforce his claim against the company, and did not know of what individuals it was composed, and before the commencement of his action against the agent replaced the name of the agent in his books as his debtor.⁵ Where a person contracts with another, who is in fact the agent of an undisclosed principal, he may, on discovering who the principal is, resort to him or to the agent with whom

¹ *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Welch v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; *McClellan v. Parker*, 27 Mo. 102; *Wheeler v. Reed*, 36 Ill. 182; *Rushing v. Sebree*, 12 Bush, 198; *Winsor v. Griggs*, 5 Cush. 210; *Cotton v. Holliday*, 59 Ill. 176; *Mauri v. Heffenan*, 13 Johns. 58; *Baldwin v. Leonard*, 39 Vt. 269; 94 Am. Dec. 324; *Farrell v. Campbell*, 3 Ben. 8; *Nixon v. Downey*, 49 Iowa, 166; *Jones v. Ins. Co.*, 14 Conn. 501; *Hall v. Bradbury*, 40 Conn. 32; *Youghiogheny Iron Co. v. Smith*, 66 Pa. St. 340; *York Co. Bank v. Stein*, 24 Md. 477; *Wolfley v. Rising*, 8 Kan. 297; *Pentz v. Stanton*, 10 Wend. 271; 25 Am. Dec. 553; *Newhall v. Dunlap*, 14 Me. 180; 31 Am. Dec. 45; *Bank of British North America v. Hooper*, 5 Gray, 567; 66 Am. Dec. 390; *Chandler v. Coe*, 54 N. H. 507; *Brent v.*

Miller, 81 Ala. 307; *Bridges v. Bidwell*, 29 Neb. 185.

² *Button v. Winslow*, 53 Vt. 430.

³ *Baldwin v. Leonard*, 39 Vt. 260; 94 Am. Dec. 324.

⁴ *Paterson v. Gandasequi*, 15 East, 62; *Thomson v. Davenport*, 9 Barn. & C. 78; *Winsor v. Griggs*, 5 Cush. 210; *Falkner v. Clark*, 11 R. I. 278. And the means of ascertaining the principal is not sufficient, there must be actual knowledge: *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51. As, for instance, the case of an auctioneer; from the nature of the trade it is known that he is merely an agent, yet he is personally bound where he does not disclose his principal: *Story on Agency*, sec. 267.

⁵ *Hutchinson v. Wheeler*, 3 Allen, 577.

he has dealt, at his election,¹ provided nothing has occurred in the mean time to alter the relations of the parties, or the creditor has not been guilty of laches.² But if after knowing all the facts he elects to hold the agent, he cannot afterwards proceed against the principal.³ Where the vendor at the time of the sale knows the principal, and that the buyer is a mere agent, and gives credit to the agent, he cannot afterwards resort to the principal.⁴ There must, however, be actual knowledge by the vendor who the principal is; merely having the means of ascertaining him is not enough;⁵ nor is it sufficient that the seller knew that the buyer was an agent, if he did not know who the principal was.⁶ Evidence of a usage of

¹ *Kingsley v. Davis*, 104 Mass. 178; *Upton v. Gray*, 2 Met. 373; *Raymond v. Crown Mills*, 2 Met. 324; *Clealand v. Walker*, 11 Ala. 1050; *Green v. Skeel*, 2 Hun, 485; *Carney v. Dennison*, 15 Vt. 400; *Coleman v. First National Bank*, 53 N. Y. 388; *Meeker v. Claghorn*, 44 N. Y. 349; *Paterson v. Gandasequi*, 15 East, 62; *French v. Price*, 14 Pick. 13; *Lovell v. Williams*, 125 Mass. 439; *Carroll v. St. Johns Soc.*, 125 Mass. 565; *Hyde v. Wolf*, 4 La. 234; 23 Am. Dec. 484; *Beebe v. Robert*, 12 Wend. 413; 27 Am. Dec. 132; *Episcopal Church v. Wiley*, 2 Hill Ch. 584; 30 Am. Dec. 386; *Merrill v. Kenyon*, 48 Conn. 314; 40 Am. Rep. 174. As to what is an election is a question for the jury: *Gardner v. Bean*, 124 Mass. 347. And see *Perkins v. Cady*, 111 Mass. 318; *Beymer v. Bonsall*, 79 Pa. St. 298; *Coleman v. First National Bank*, 53 N. Y. 388; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51. If he proceeds against the agent knowing all the facts, he cannot afterwards resort to the principal: *Jones v. Aetna Ins. Co.*, 14 Conn. 501; *Kingsley v. Davis*, 104 Mass. 178.

² *Rathbone v. Tucker*, 15 Wend. 488; *Thomas v. Atkinson*, 38 Ind. 248; *Hooper v. Robinson*, 98 U. S. 528; *Story on Agency*, sec. 449.

³ *Kingsley v. Davis*, 104 Mass. 178; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51.

⁴ *Paterson v. Gandasequi*, 15 East,

62; *Raymond v. Crown Mills*, 2 Met. 324; *Paige v. Stone*, 10 Met. 160; *Hyde v. Paige*, 9 Barb. 151; *Maryland Coal Co. v. Edwards*, 4 Hun, 434.

⁵ *Raymond v. Crown and Eagle Mills*, 2 Met. 324; *contra*, *Lyon v. Williams*, 5 Gray, 557.

⁶ *Thomson v. Davenport*, 9 Barn. & C. 78. In this leading case Lord Tenterden said: "I take it to be a general rule that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification: that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him, and him alone, then, according to the cases of *Addison v. Gandasequi*, and *Patterson v. Gandasequi*, the seller cannot afterwards, on the failure of the agent, turn round and charge the prin-

trade that a person purchasing for an undisclosed principal is personally liable is admissible.¹ But a usage to exonerate an agent signing a contract in his own name from liability is inadmissible.²

principal, having once made his election at the time he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods the plaintiffs were informed that McKune, who came to them to buy the goods, was dealing for another, — that is, that he was an agent, — but they were not informed who the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls, in substance and effect, within the first proposition which I have mentioned, — the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known." Mr. Justice Bayley added: "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he may do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification: that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the plaintiff has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller who knows who the principal is, and instead of debiting the principal debits the agent, is considered, according to the authorities which have been referred to, as

consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that, although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller, or to the solvent agent, or to the estate of the insolvent agent who has made no payment in respect of these goods. The justice of the case is, as it seems to me, all on one side; namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else."

¹ *Humfrey v. Dale*, 7 El. & B. 266; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Hutchinson v. Tatham*, L. R. 8 Com. P. 482.

² *Magee v. Atkinson*, 2 Mces. & W. 440; *Trueman v. Loder*, 11 Ad. & E. 589.

ILLUSTRATIONS.—One whose name appears on a store sign in the name of a firm, in buying goods, does not disclose the fact that he is only an agent, and the seller supposes him to be a partner. *Held*, that he is liable for the price of the goods: *Bartlett v. Raymond*, 139 Mass. 275. In an action by R. against D. for the keeping of a horse, which was defended on the ground that the horse belonged to T., who was to pay for his keeping, the judge instructed the jury that if R.'s servant, with whom the horse was originally left, "understood that the horse was there for T. as T.'s horse, and at his charge, and that T. was to pay for the keeping, R. could not recover"; and declined to instruct them that "if D., by himself or his agent, left the horse at R.'s stable, R. could recover unless D. notified him to look to T. for pay, and R. agreed to look to T. for pay." *Held*, that R. had no ground of exception: *Randall v. Doane*, 9 Gray, 408. An authorized agent makes a promissory note in form, "I promise to pay," etc., and signs as agent without mentioning his principal. *Held*, he is liable as maker of the note, notwithstanding the fact that the payee knew he was acting as such agent at the time: *Collins v. Ins. Co.*, 17 Ohio St. 215; 93 Am. Dec. 612. A man called upon one of several partners to purchase hay, saying that he was purchasing as agent for another. The partner told him he was not ready to sell or contract hay at that time; that it was not all cut. The agent left, saying that he would call again. He called again, four weeks later, when the first-mentioned partner was absent, and purchased the hay from another partner without disclosing his agency. *Held*, that he was personally liable, and that his former conversation with the first partner, being no part of the negotiation, was not notice to the firm: *Baldwin v. Leonard*, 39 Vt. 260; 94 Am. Dec. 324.

§ 108. Agent may Bind Himself Personally.—But an agent may bind himself personally; as, by an express warranty that a note of his principal is genuine,¹ or by a failure to disclose that he is acting as an agent.² "There

¹ *Wilder v. Cowles*, 100 Mass. 487.

² *Farrell v. Campbell*, 3 Ben. 8; *Welch v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436. In *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615, an express company received a draft for collection, drawn upon H., and presented and collected it without disclosing to H. that it was acting as agent. The payee's indorsement had been forged, and H. was

afterwards compelled to pay the amount to the payee. It was held that H. was entitled to recover what he had paid from the express company, because it had not disclosed its agency. "The express company," said Earl, C., "when it presented the draft to the plaintiffs for payment, and received payment, did not disclose its agency; therefore it is liable, as if actually principal in the transaction. It was so decided in *Canal*

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is one rule," says Shaw, C. J., "well established by the authorities, and defined with a good deal of certainty. It is this, that although an agent is duly authorized, and although he might avoid personal liability by acting in the name and behalf of his principal, still if by the terms of his contract he binds himself personally, and engages expressly in his own name to pay or perform other obligations, he is responsible, although he describe himself as agent."¹ The rule is well stated by Bramwell, J., in a late English case:² "A person who is acting for another, and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is, that if the contract is by word of mouth, it is not possible to say, from the agent using the words 'I' and 'me,' that he meant to bind himself personally; whereas if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and accordingly he is taken to do so. It is well settled that an agent is responsible, though

Bank v. Bank of Albany, 1 Hill, 287. It was not sufficient that the defendant acted as agent; to shield itself from liability, it should have disclosed its agency. Such is the rule as to all agents. To shield themselves from liability for their acts, they must give the names of their principals. Such is the rule in reference to the transfer of negotiable paper. If the transferrer be only an agent, if he did not at the time disclose the name of his principal, and the bill or note proves to be a forgery, he is personally liable for the consideration received: *Gurney v. Womersley*, 4 El. & B. 133; *Morrison v. Currie*, 4 Duer, 79; 2 Parsons on Notes, sec. 38. It matters not that the general business of the express company was to act as agent for others. It could have owned this draft, and have collected it as principal. Knowledge in plaintiffs that defendant might have acted as agent

was not enough; and it was not the duty of the plaintiffs to inquire, before paying, whether the defendant was acting as principal or agent. It was the duty of defendant, if it desired to be protected as agent, to have given notice of its agency."

¹ *Simonds v. Heard*, 23 Pick. 125; 34 Am. Dec. 41; *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94; *Collins v. Butts*, 10 Wend. 399; *Chandler v. Coe*, 54 N. H. 561; *Mills v. Hunt*, 20 Wend. 431; *Towle v. Hatch*, 43 N. H. 270; *Southard v. Sturtevant*, 109 Mass. 290. "The fact that the contract is in form the personal promise of C. is very strong, if not conclusive, evidence that it was entered that he should be bound by it": *Guernsey v. Cook*, 117 Mass. 548; *Fullam v. Inhabitants*, 9 Allen, 1; *Morell v. Coddington*, 4 Allen, 403; *Fisher v. Haggerty*, 36 Ill. 128.

² *Williamson v. Barton*, 31 L. J. Exch., N. S., 174.

known by the other party to be an agent, if by the terms of the contract he makes himself the contracting party." So an agent who receives freight consigned to him is personally liable for the charges,—on the broad principle that he who accepts a thing which he knows is subject to a duty or charge impliedly contracts to take the duty and charge on himself.¹ But it is otherwise where his agency is known, and there is no stipulation in the bill of lading that the consignee shall pay freight.²

ILLUSTRATIONS.—The treasurer of a club agreed to rent from the plaintiff a piece of ground for the use of the club, and by an agreement in writing bound himself to pay the rent. *Held*, that he was personally liable: *McWilliams v. Willis*, 1 Wash. (Va.) 199. H. was working for F. and Sons at a stipulated price *per diem*, and was employed by their clerk and agent to continue working after hours for extra compensation. *Held*,

¹ Story on Agency, sec. 274; Boston etc. R. R. Co. v. Witcher, 1 Allen, 497; *Falkenberg v. Clark*, 11 R. I. 278.

² Boston etc. R. R. Co. v. Witcher, 1 Allen, 497, where the law is thus stated by Bigelow, C. J.: "The cases in which an agent has been held liable to pay the freight of goods consigned to him proceed on the ground that, by the terms of bills of lading, as usually drawn, especially in cases of transportation by water, the consignee is to pay the freight. In other words, the carrier undertakes to deliver the property to the consignee, 'he paying freight for the same.' Whoever accepts delivery under such a bill of lading, contracts, by implication, to pay the freight due on them; and if the name of the agent only is inserted in the bill, without any designation of the character or capacity as agent for another in which he receives the goods, he is liable individually for the freight, because he thereby becomes an original contractor to pay therefor. These cases rest on the principle that he who accepts a thing which he knows to be subject to a duty or charge, for which he is expected to pay, thereby contracts by implication to take the duty or charge on himself: *Cock v. Taylor*, 13 East, 399; *Wilson v. Kyner*, 1

Mau. & S. 157; *Dougal v. Kemble*, 3 Bing. 383; *Amos v. Temperly*, 8 Mees. & W. 798. But no case can be found which goes the length of holding that an agent is liable for the freight of goods sent to and received by him, when his agency is known to the carrier at the time of the delivery of the goods, and when there is no stipulation in the contract of transportation by which the consignee is to pay the freight. In such a case, the essential elements of a contract are wanting. There is nothing from which an intent on the part of the shipper or carrier to charge the agent, or an agreement by the agent to pay the freight, can be inferred. A mere naked consignment to an agent does not make him liable for the freight, where the agency is known, and there is no stipulation that the consignee shall pay freight. In the case at bar, there is nothing to show that there was any way-bill or other document by which the defendant, as consignee, was to pay freight on the granite which the plaintiffs transported. It was carried by them for a principal whom they knew, and it was delivered to the defendant with a full knowledge that he received it only as agent, and without any implied agreement that he would be personally liable therefor."

that the promise to pay extra was an express undertaking on the part of the agent; and that the suit was properly brought against him to recover it: *Fisher v. Haggerty*, 38 Ill. 128. The defendant, who was the agent of one S., the general agent of a steamship company, sold to the plaintiff a passage ticket, disclosing the name of his principal. By its terms the ticket was good for one year. It was further agreed that if the ticket should be returned unused within that time, the money paid therefor should be refunded. Before the expiration of the year the plaintiff told the defendant that the ticket could not be used until a certain time after the expiration of the year, and asked if it would hold good until then. The defendant said that it should, and that if it was not then used he would refund the money. The ticket was not used within the time, and was afterwards returned to the defendant, who promised to refund the money, but did not do so. *Held*, in an action for money had and received, that the above facts warranted a finding that the defendant personally promised to refund the money; and that the return of the ticket was a sufficient consideration for such a promise: *Coggins v. Murphy*, 121 Mass. 166.

§ 109. Notice to Agent not to Pay over Money to Principal.—An agent who receives money from his principal may be notified by the payor not to turn it over; and if such notice is given before he pays it over he will be personally liable.¹ On the other hand, if before the notice he has in good faith paid over the money to his principal he will not be liable.² It is necessary, however, that the payor should have a legal right to recall the money,³ and that the state of accounts between principal and agent shall not in the mean time have changed.⁴

¹ *Buller v. Harrison*, 1 Cowp. 566; *Mowatt v. McLelan*, 1 Wend. 173; *Hearsey v. Pruyn*, 7 Johns. 179; *La Farge v. Kneeland*, 7 Cow. 456; *Garland v. Salem Bank*, 9 Mass. 408; 6 Am. Dec. 86; *Duffy v. Buchanan*, 1 Paige, 453; *White v. Coleman*, 127 Mass. 34; *Elliott v. Swartwout*, 10 Pet. 137.

² *Langley v. Warner*, 1 Sand. 209; *Mowatt v. McLelan*, 1 Wend. 173; *Elliott v. Swartwout*, 10 Pet. 137; *McDonald v. Napier*, 14 Ga. 89; *Upchurch v. Norsworthy*, 15 Ala. 705; *Shipherd*

v. Underwood, 55 Ill. 475. But *aliter* if the money has been obtained by the agent illegally by compulsion or extortion: *Frye v. Lockwood*, 4 Cow. 456; *Elliott v. Swartwout*, 10 Pet. 137. Or his authority to receive it was void, and he knew it to be so: *Story on Agency*, sec. 301.

³ *Bank of United States v. Bank of Washington*, 6 Pet. 8; *Mowatt v. McLelan*, 1 Wend. 173; *Colvin v. Holbrook*, 2 N. Y. 126.

⁴ *Story on Agency*, sec. 300.

§ 110. Liability of Agent Acting without Authority.—

An agent acting without authority—as, for example, making a contract as the agent of his principal, which is not binding on his principal because he was not authorized—is liable in damages to the person dealing with him on the faith that he possessed the authority assumed.¹ There are decisions which hold the agent personally bound by the contract which he makes without authority in the name of another.² But the correct view is, that the agent's liability is upon the implied warranty of authority or a special action on the case.³ By any other rule,⁴ "courts would often make contracts for parties which neither intended nor would have consented to make. The contract, if binding upon one party, must be binding upon both,

¹ *Baltzen v. Nicolay*, 53 N. Y. 467; *Collen v. Wright*, 8 El. & B. 647; *White v. Madison*, 26 N. Y. 117; *Jefts v. York*, 4 Cush. 371; 50 Am. Dec. 791; *Johnson v. Smith*, 21 Conn. 627; *Noyes v. Loring*, 55 Me. 408; *McCurdy v. Rogers*, 21 Wis. 197; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Randell v. Trimen*, 18 Com. B. 780; *Downman v. Jones*, 9 Jur. 454; *Pitman v. Kitner*, 5 Blackf. 250; 33 Am. Dec. 469; *Silliman v. Fredericksburg R. R. Co.*, 27 Gratt. 119; *Palmer v. Stephens*, 1 Denio, 471; *Lander v. Castro*, 43 Cal. 497; *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146; *Sanborn v. Neal*, 4 Minn. 126; 77 Am. Dec. 532. But *attiter* as to a public agent: *McCurdy v. Rogers*, 21 Wis. 197; *Sanborn v. Neal*, *supra*. "In our opinion, the weight of authority is decided by that one who, without authority, executes an instrument in the name of another, whose name he puts to it, and adds his name only as agent for that other, cannot be treated as a party to that instrument and be sued upon it, unless it be shown that he was the real principal. . . . An action in the nature of an action on the case lay against defendant for falsely assuming authority to act as agent"; *Sheffield v. Ladue*, 10 Minn. 388; 10 Am. Rep. 145.

² *Weare v. Cove*, 44 N. H. 196; *Grafton Bank v. Flanders*, 4 N. H. 239; *Underhill v. Gibson*, 2 N. H. 352; 9

Am. Dec. 88; *Mitchell v. Hazen*, 4 Conn. 495; 10 Am. Dec. 169; *Hampton v. Speckenagle*, 9 Serg. & R. 212; 11 Am. Dec. 705; *Gillaspie v. Wesson*, 7 Port. 454; 31 Am. Dec. 715; *Brown v. Johnson*, 12 Snedcs & M. 398; 51 Am. Dec. 118; *Keener v. Harrod*, 2 Md. 63; 56 Am. Dec. 703. To this effect were several early New York cases: *Dusenbury v. Ellis*, 3 Johns. Cas. 70; 2 Am. Dec. 144; *White v. Skinner*, 13 Johns. 307; 7 Am. Dec. 381; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Collins v. Allen*, 12 Wend. 356; 27 Am. Dec. 130; and other cases cited in *White v. Madison*, 26 N. Y. 117. But these early cases are now overruled: See *Walker v. State Bank*, 9 N. Y. 582, and *Brightley's note* 585; *Dung v. Parker*, 52 N. Y. 499; *Baltzen v. Nicolay*, 53 N. Y. 467.

³ Cases *ante*: *Polhill v. Walter*, 3 Barn. & Adol. 114; *Abbey v. Chase*, 6 Cush. 54; *Bush v. Cole*, 28 N. Y. 261; 84 Am. Dec. 343; *Harper v. Little*, 2 Greenl. 14; 11 Am. Dec. 25; *Stetson v. Patten*, 2 Greenl. 358; 11 Am. Dec. 111; *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160; *Trowbridge v. Scudder*, 11 Cush. 87; *Draper v. Massachusetts Co.*, 5 Allen, 339; *Sherman v. Fitch*, 93 Mass. 63; *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293; *Sheffield v. Ladue*, 10 Minn. 388; 10 Am. Rep. 145.

⁴ *Selden, J.*, in *White v. Madison*, 26 N. Y. 117.

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and where burdensome conditions precedent were to be performed by the party contracting with the assumed agent, before performance could be demanded of the other party, or where the agent should undertake to sell, lease, or mortgage the property of the assumed principal, or where credit should be given which the responsibility of the agent would not justify, great injustice might result from such a rule. In those cases, and I think in all cases where one pretending to be an agent has contracted as such without authority from the principal, the party contracted with, on learning the facts, must have the right to repudiate the contract, and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action might be maintained on the contract itself; and the damages must be measured, not by the contract, but by the injury resulting from the agent's want of power. Whenever a person enters into a contract as agent for another, he warrants his own authority, unless very special circumstances or express agreement relieve him from that responsibility.¹ An action upon such warranty must always be appropriate where personal liability attaches to an agent in consequence of his contracting without authority. In such action the plaintiff would be relieved from the necessity of showing performance of condition precedent, and from the delay which the terms of the contract might require, if the remedy were limited to an action on the contract; and if special damages should be incurred in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action against the principal to enforce the contract, they might be recovered."² And he is liable,

¹ *Smout v. Ilbery*, 10 Mees. & W. 9, 10; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Jenkins v. Hutchinson*, 13 Ad. & E. N. S., 744; *Jefts v. York*, 10 Cush. 395; 9 N. Y. 585; *Story on Agency*, sec. 164.

² One who, without authority, assumes to act as agent of another, and makes either a deed or a simple con-

tract in the name of the latter, is not personally liable on the covenants in the deed or on the promise in the simple contract, unless it contain apt words to bind him personally, and the only remedy against him is an action on the case for falsely assuming authority to act as agent: *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293.

even though he *bona fide* believed at the time that he had authority.¹ This statement, though found in many of the cases, is too broad. The better test, according to a late author,² is, whether the agent has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act.³ Therefore where the authority of the agent has been revoked by the death of his principal, unknown to both parties, the agent is not liable.⁴ And to render the agent liable, the unauthorized contract must have been such a one as could have been enforced against the principal had it been authorized by him.⁵ Where he acts under a public statute, the person with whom he deals will be held to a knowledge of the powers it confers, and consequently is presumed to know

¹ *Collen v. Wright*, 8 El. & B. 647, and cases cited *ante*; *Story on Agency*, sec. 264; *Smout v. Ilbery*, 10 Mees. & W. 1; *Jefts v. York*, 10 Cush. 392; *Bank of Hamburg v. Wray*, 4 Strob. 87; 51 Am. Dec. 659; *Dale v. Donaldson Lumber Co.*, 48 Ark. 188; 3 Am. St. Rep. 224.

² *Evans on Agency*, 303.

³ "One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he thus contracts to repose in his authority, that he may be liable. If he enters into the contract in the name and as the agent of another, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one contracted with, from such information or otherwise, is fully informed of the authority possessed or claimed by him, he is not liable on the ground of deceit or for misleading the other party. It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has

a full knowledge of the facts, or if such facts as fairly and fully put him upon inquiry for them, and he fails to avail himself of such knowledge or the means of knowledge reasonably accessible to him, he cannot say that he was misled, simply on the ground that the party assumed to act as agent, without authority in the absence of fraud": *Newman v. Sylvester*, 42 Ind. 106; *Aspinwall v. Torrance*, 1 Lans. 381; *Tiller v. Spradley*, 39 Ga. 35; *Carriger v. Whittington*, 26 Mo. 311; 72 Am. Dec. 212; *McCubbin v. Graham*, 4 Kan. 397; *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429.

⁴ *Smout v. Ilbery*, 10 Mees. & W. 1.

⁵ *Baltzen v. Nicolay*, 53 N. Y. 467; *Dung v. Parker*, 52 N. Y. 494. A, falsely representing himself as authorized by B, made a parol contract for the leasing of B's store to C for the term of two years. C thereupon incurred expense in procuring fixtures for the store. *Held*, that the contract, being void by the statute of frauds, was not enforceable against B if A had the authority, and A was not liable in damages: *Dung v. Parker*, 52 N. Y. 494; *Bozza v. Rowe*, 30 Ill. 198; 83 Am. Dec. 184; *McKubin v. Clarkson*, 5 Minn. 247.

that the agent was exceeding his authority.¹ And if the principal is liable, notwithstanding the agent's want of authority, no action will lie against the agent.² Thus, for example, if the principal afterwards ratify his unauthorized act. "If his employers ratify his unauthorized act in signing their name, the signature becomes theirs, and the note becomes theirs when executed, for the ratification relates back to the execution. The plaintiffs have got what they bargained for, and have no longer any cause of action for damages against the agent. This would not hold good of course in cases in which such suit for damages had been brought before ratification, nor in any cases in which injury had resulted to plaintiffs from defendant's act before ratification, or in which the effect of making the ratification thus relate back would be to put the plaintiffs in a worse position than they would otherwise have been in in consequence of such unauthorized act of defendant."³ So one who induces another to exceed his authority cannot hold him personally liable on the unauthorized contract.⁴

¹ McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468.

² Landon v. Proctor, 39 Vt. 78. An agent of a corporation was authorized to sign "all notes and business paper of the corporation." He gave accommodation notes for other purposes in the corporation's name, which passed into the hands of a *bona fide* holder for value. *Held*, notwithstanding his want of authority, the corporation was liable on the notes, and the agent could not be sued: Bird v. Daggett, 97 Mass. 494. "The plaintiff," said the court, "as a *bona fide* holder for value of notes taken before maturity, can recover against the corporation, notwithstanding any want of authority of the agent to execute these particular notes for the purposes for which they were given. For the defendant was expressly authorized 'to sign all notes and business paper of the company.' The plaintiff, therefore, in valid notes against the corporation, has all that he

expected to obtain, and all that the defendant undertook to give. What injury, then, has he sustained? The notes cannot be at once binding upon the corporation and the agent. The representation of the agent's authority to give them for the company, whether made expressly or merely implied from the mode of signature, was consequently immaterial. The tort of an agent who has falsely assumed authority which he did not have 'is a proper subject for special action, in which damages will be recovered according to the injury sustained': Ballou v. Talbot, 16 Mass. 461; 8 Am. Dec. 146. The measure of damages is not necessarily the precise amount of the notes. Where, as in the present case, the plaintiff has suffered nothing, he can recover nothing."

³ Sheffield v. Ladue, 16 Minn. 388; 10 Am. Rep. 145.

⁴ Aspinwall v. Torrance, 1 Lans. 381.

§ 111. **Agent not Liable Personally for Torts.**—An agent who, in the discharge of his duties, is guilty of an act of negligent omission, whereby another person is injured, is not personally responsible. "The maxim *respondet superior* prevails; the principal is liable for the injury, and the agent is then liable to the principal for damages which the latter may have sustained."¹ An agent or servant who, acting by his master's direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, assists the master in disposing of property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property.² And an agent is not personally liable for the negligence or misfeasance of those whom he has retained for the service of his principal by his consent or authority; unless, indeed, the particular acts are done by the orders or directions of the agent.³

ILLUSTRATIONS.—An agent of a factor fails to transmit the orders of a third person to his principal, as to the sale of cotton consigned by such third person to his principal. He is not liable personally to the third person: *Reid v. Humber*, 49 Ga. 207. An agent having the care of real estate for a non-resident owner neglected to keep the floor of one of his buildings in repair, whereby a person rightly there was injured. *Held*, that

¹ Wharton on Agency, sec. 535. "If third persons are injured by the neglect of a known agent, the rule is *respondet superior*, and generally the action must be brought against the principal: *Denny v. Manhattan Co.*, 2 Denio, 116; 5 Denio, 115. The rule, it is believed, is universal that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred on him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself, and the individuality of the agent, so far, is merged in that of the principal. It

is also settled, if anything can be established as authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible": *Colvin v. Holbrook*, 2 N. Y. 129; *Hall v. Lauderdale*, 46 N. Y. 70; *Henshaw v. Noble*, 7 Ohio St. 231; *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; *Brown Paper Co. v. Dean*, 123 Mass. 267; *Dayton v. Pease*, 4 Ohio St. 80; *Nussbaum v. Heilbron*, 63 Ca. 312; *Brown v. Lent*, 20 Vt. 533; *Labadie v. Hawley*, 61 Tex. 177; 48 Am. Rep. 278.

² *Leuthold v. Fairchild*, 35 Minn. 99.

³ *Story on Agency*, sec. 313.

the agent was not personally liable: *Delaney v. Rochereau*, 34 La. Ann. 1123; 44 Am. Rep. 456.¹

§ 112. **Exceptions.**—But to this rule there are exceptions: 1. Where the agent is not merely acting as the hand of the principal, but is invested with authority to act in the matter according to his discretion.² The sale of stolen property of another by an agent for the benefit of his principal evidences conversion; and to make the agent liable, it is not necessary that he use the proceeds for his own benefit.³ 2. Where the agent's act is one of negli-

¹ "The theory," said the court, "on which the suit rests is, that agents are liable to third parties injured for their non-feasance. In support of that doctrine, both the common and the civil law are invoked. At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent in the latter case being liable to his principal only. For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men. An agent is not responsible to third persons for any negligence in the per-

formance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible. The whole doctrine on that subject culminates in the proposition, that wherever the agent's negligence, consisting in his own wrong-doing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury: Story on Agency, 308, 309; Story on Bailments, 165; Shearman and Redfield on Negligence, 111, 112, ed. 1874; Evans on Agency, notes by Ewell, 437, 438; Wharton on Negligence, 78, 83, 535, 780. It is an error to suppose that the principle of the civil law on the liability of agents to third persons is different from those of the common law. It is certainly not broader."

² *Harriman v. Stowe*, 57 Mo. 93; *Bliss v. Schaub*, 48 Barb. 339; *Blake v. Ferris*, 5 N. Y. 48; *Hilliard v. Richardson*, 3 Gray, 349; 63 Am. Dec. 743; *Milligan v. Wedge*, 4 Ad. & E. 737. *Bell v. Josslyn*, 3 Gray, 309, 63 Am. Dec. 741, cited under the next exception, is considered by Mr. Wharton (*Wharton on Agency*, sec. 537) to properly fall under this exception.

³ *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324.

gent commission; a misfeasance as distinguished from a non-feasance. In the words of Lord Holt in a much quoted case:¹ "For a neglect in him, they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal; for a servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer."² 3. Where the agent acts willfully or maliciously,³ even if he be a voluntary and gratuitous agent.⁴ 4. Where the agent acts fraudulently.⁵ Thus an agent is personally liable for deceit and false representations made by him.⁶ One falsely and fraudulently asserting that he is authorized to act as the agent of another, or knowingly and fraudulently exceeding his authority, is liable to those dealing with him on the faith of his representations for the damages which they may suffer thereby.⁷ The remedy is not against the professing agent on the contract, but is by an action against him for the fraud and deceit.⁸ If a party, falsely assuming the character of agent, sells property and receives the consideration, the purchaser may recover back

¹ Lane v. Cotton, 12 Mod. 488.

² Horner v. Lawrence, 37 N. J. L. 46; Campbell v. Portland Sugar Co., 62 Me. 552; 16 Am. Rep. 503; Nowell v. Wright, 3 Allen, 166; Gilmore v. Driscoll, 122 Mass. 208; 23 Am. Rep. 312; Parsons v. Winchell, 5 Cush. 592; 12 Am. Dec. 745; Osborne v. Morgan, 150 Mass. 102; 39 Am. Rep. 437; overruling Albro v. Jaquith, 4 Gray, 99.

³ Wharton on Agency, sec. 541; Wright v. Wilcox, 19 Wend. 343; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 478, 480; 51 Am. Dec. 315; Isaacs v. Third Av. R. R. Co., 47 N. Y. 122; 7 Am. Rep. 418; Horner v. Lawrence, 37 N. J. L. 46; Johnson v. Barber, 5 Gilm. 425; 50 Am. Dec. 416.

⁴ Hammond v. Hussey, 51 N. H. 40; 12 Am. Rep. 41.

⁵ Sprights v. Hawley, 39 N. Y. 441; 100 Am. Dec. 452; Reed v. Peterson, 91 Ill. 297.

⁶ Wharton on Agency, sec. 541; Hedden v. Griffin, 136 Mass. 229; 49 Am. Rep. 25.

⁷ Godwin v. Francis, L. R. 5 Com. P. 295; Jeffs v. York, 4 Cush. 371; 50 Am. Dec. 791; 10 Cush. 392; Elmore v. Brooks, 6 Meisk. 45; Richardson v. Kimball, 28 Me. 463; Wright v. Eaton, 7 Wis. 595.

⁸ Abbey v. Chase, 6 Cush. 54; Jeffs v. York, 10 Cush. 392; Noyes v. Loring, 55 Me. 408; McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468; Bartlett v. Tucker, 104 Mass. 336; 6 Am. Rep. 240; contra, Palmer v. Stephens, 1 Denio, 471; Grafton Bank v. Flanders, 4 N. H. 239.

the money.¹ 5. An agent doing an illegal act cannot defend himself by showing that what he did was in accordance with the orders of his principal, or solely for his principal. He has no right to obey illegal orders, or to do illegal acts for others.²

ILLUSTRATIONS.—An agent having the general management of a house owned by another negligently directed water to be let into the house, the pipes of which were out of repair, whereby damage ensued to the tenant. *Held*, that he was personally liable: *Bell v. Josselyn*, 3 Gray, 309; 63 Am. Dec. 741.³ A carpenter while at work in a wire factory of a company putting up partitions was injured by a tackle-block and chain falling on him, which had been placed there by the superintendent of the factory, and not properly secured and protected. *Held*, that the superintendent was liable in damages: *Osborne v. Morgan*, 130 Mass. 102; 39 Am. Rep. 437.⁴ An agent fraud-

¹ Long v. Hickingbottom, 28 Miss. 772; 64 Am. Dec. 118.

² Thorp v. Burling, 11 Johns. 285; Richardson v. Kimball, 28 Me. 463; Brown v. Howard, 14 Johns. 120; Edgerly v. Whalan, 106 Mass. 307; McPartland v. Read, 11 Allen, 231; Burnap v. Marsh, 13 Ill. 535; Johnson v. Barber, 5 Gilm. 425; 50 Am. Dec. 416; Josselyn v. McAllister, 22 Mich. 300; Gaines v. Briggs, 9 Ark. 46; Elmore v. Brooks, 6 Heisk. 45; Permyer v. Kelly, 18 Ala. 716; 54 Am. Dec. 177; Crane v. Onderdonk, 67 Barb. 47; Kimball v. Billings, 55 Me. 147; 92 Am. Dec. 581; Baker v. Wasson, 53 Tex. 157; Lee v. Mathews, 10 Ala. 682; 44 Am. Dec. 498.

³ "Assuming that he was a mere agent," said the court, "yet the injury for which this action is brought was not caused by his non-feasance, but by his misfeasance. Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all: 2 Inst. Cler. 10; 2 Dane Abr. 482; 1 Chitty's Pleadings, 6th Am. ed., 151; 1 Chitty's General Practice, 9. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a non-feasance. But if he had not caused the water to

be let on, that non-feasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither non-feasance nor misfeasance. As the facts are, the non-feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a non-feasance." In a New York case this doctrine was applied to a case where an agent intrusted with the control of stock for a specific purpose misapplied it: *Crane v. Onderdonk*, 67 Barb. 47.

⁴ "It is often said in the books," said Gray, C. J., in this case, "that an agent is responsible to third persons for a misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts;

ulently represented that the title to his principal's property was absolute when he knew it was only a life interest. The agent was held personally liable: *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195. An insurance agent represented to plaintiff when he was taking a policy on his house that the clause prohibiting the keeping of petroleum would not affect the policy. The plaintiff sustained a loss, and could not recover on account of the clause as to petroleum. *Held*, that the agent was personally liable in damages for the misrepresentation: *Kroeger v. Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718.¹ A, the president

and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly: *Ulpian*, in Dig. 9, 2, 27, 9; *Parsons v. Winchell*, 5 Cush. 592; 52 Am. Dec. 745; *Bell v. Josselyn*, 3 Gray, 309; 63 Am. Dec. 741; *Nowell v. Wright*, 3 Allen, 166; 80 Am. Dec. 62; *Horner v. Lawrence*, 37 N. J. L. 46. Negligence and unskillfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere non-feasance within the meaning of the rule relied on than negligence in the control of fire, as in the case in the *Pandects*; or of water, as in *Bell v. Josselyn*; or of a drawbridge, as in *Nowell v. Wright*; or of domestic animals, as in *Parsons v. Winchell*, and the case in New Jersey. In the case at bar, the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath was a misfeasance, or improper dealing with instruments in the defendant's actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action."

¹ *Kroeger v. Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718. "It was not," said the court, "until after the property was destroyed that he was undeceived. He then discovered that in consequence of defendant having exceeded his authority he was without remedy against the company. Has he any remedy against the defendant,

by whose unauthorized act he was placed in this false position? We think he has. If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority, and thereby misled the plaintiff to his injury, whether intentionally or not? The only difference is, that in the latter the authority is self-assumed, while in the former it is actual; but that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, 'whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for or on account of his principal': *Story on Agency*, sec. 264. The same principle is recognized in *Evans on Agency*, 301; *Wharton on Agency*, sec. 524; 2 *Smith's Lead. Cas.* 380, note; 1 *Parsons on Contract*, 67; and in numerous adjudicated cases, among which are: *Hampton v. Speckenagle*, 9 Serg. & R. 212, 222; 11 Am. Dec. 704; *Layng v. Stewart*, 1 Watts & S. 222, 226; *McConn v. Lady*, 10 Week. Not. Cas. 493; *Jefts v. York*, 10 Cush. 392; *Baltzen v. Nicolay*, 53 N. Y. 467. In the latter case it is said, the reason why an agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form

of a political club, managed a display of fire-works in the street, the cost of which was raised by a subscription being paid by him. One of the fire-works exploded and injured B. *Held*, that A was personally liable: *Jenne v. Sutton*, 43 N. J. L. 257; 39 Am. Rep. 578.¹ Forsyth, the owner of a strip of woodland through which a railroad ran, having procured the wood to be cut, employed Horner to haul it. Horner, in order to reach said woodland, obtained permission from Lamb, the owner of an adjoining field, where the hogs of Lawrence were being pastured, to pass through the field, and to open a gap in the fence at a certain place, with directions to close it up after he went in and after he came out, as the hogs and cattle in the field might get through on the railroad and get killed. Horner passed through with his teams, leaving the gap open while the wagons were being loaded, but closing it when he went out; the hogs escaped through the gap, and one was killed and the other injured on the railroad. *Held*, that the leaving down the bars by Horner was an intentional and willful violation of his authority, and a misfeasance for which, as a servant or agent for Forsyth, he cannot claim exemption against the party injured: *Horner v. Lawrence*, 37 N. J. L. 46.

that of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority. In *Layng v. Stewart*, 1 Watts & S. 222, 226, Mr. Justice Huston says: 'It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound.' The plaintiff in error, in *McConn v. Lady*, *supra*, made a contract, believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make the contract as agent, and this court, in affirming the judgment, said: 'It was a question of fact submitted to the jury whether the plaintiff in error had authority from the school board to make the contract as their agent. They found he had not. He was personally liable, whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract. The cases in which agents

have been adjudged liable personally have sometimes been classified as follows, viz: 1. Where the agent makes a false representation of his authority with intent to deceive; 2. Where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and 3. Where he undertakes to act *bona fide*, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent, and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents in cases belonging to the third class has sometimes been doubted, the weight of authority appears to be that they are also liable."

¹ "It can signify nothing," said the court, "that he was acting in his official capacity as the president of this corporation, for all the participants in the creation of a public nuisance are liable to answer for its ill effects, without regard to the fact that they in such affair were but the agents of other persons."

§ 113. **Liability of Principal on Agent's Contracts—Law Already Discussed.**—A principal is bound by the acts of his agent done within the scope of his real or apparent authority. The persons dealing with an agent have therefore the same right against the principal—subject to the qualification in the first sentence—that they would have had had they dealt with him personally. The questions to be determined are simply these: Had the agent a real authority to make the contract? If not, had he an apparent authority? Was he held out by the principal as having such authority? Did the principal afterwards ratify the agent's act and accept its benefits? The answer to these questions determines the principal's liability to third persons, and the law as to them has been already discussed in the previous chapters on authority to agent¹ and ratification.² A principal may also be liable on contracts made by an agent, though he is not known at the time by the other party to be an agent. This liability has been treated in a former section of this chapter relating to the liability of an agent of an undisclosed principal.³ A principal who has executed a contract for the sale of lands, and authorized an agent to receive an installment of purchase-money under the contract, and given the purchaser to understand that the balance was to be paid to such agent, cannot repudiate the agency and refuse to execute the deed because the agent, to whom the purchaser has paid the whole of the purchase-money, is unable to pay it over to the principal.⁴ That a person knew when he entered into a contract in writing not under seal, purporting on its face to be made on the other part by A and signed by "A, agent," that A was in fact contracting as agent for B, will not prevent him from maintaining an action against B on the contract.⁵

¹ *Ante*, p. 25.

² *Ante*, p. 31.

³ *Ante*, § 107.

⁴ *Hand v. Jacobus*, 25 N. J. Eq. 154.

⁵ *Byington v. Simpson*, 134 Mass. 169; 45 Am. Rep. 314.

§ 114. **Liability of Principal for Agent's Torts.**—A principal is liable civilly for the frauds and deceits of his agent in the course of his employment, whether authorized or known, or not.¹ So also a principal is bound by the false representations of an agent inducing a purchase

¹ *Durst v. Burton*, 47 N. Y. 167; 7 Am. Rep. 428; *Lobdell v. Baker*, 1 Met. 202; 35 Am. Dec. 358; *Bennett v. Judson*, 21 N. Y. 238; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Concord Bank v. Gregg*, 14 N. H. 331; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; 56 Am. Dec. 116; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *Udell v. Atherton*, 7 Hurl. & N. 172; *Swift v. Winterbottom*, L. R. 8 Q. B. 244; *Mackay v. Commercial Bank*, 30 L. T., N. S., 180; *Reeves v. State Bank*, 8 Ohio St. 465; *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476; *Sandford v. Handy*, 23 Wend. 260; *White v. Sawyer*, 16 Gray, 586; *Brokaw v. New Jersey R. R. Co.*, 32 N. J. L. 328; 90 Am. Dec. 659; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; 24 Am. Rep. 447; *Rhoda v. Annis*, 75 Me. 17; 46 Am. Rep. 354; *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508; *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60; 90 Am. Dec. 407. He is not liable criminal'y, however, as to be arrested for a fraudulent debt made by the agent: *Hathaway v. Johnson*, 55 N. Y. 93; 14 Am. Rep. 186. An agent of a firm sold a quantity of meal which he fraudulently asserted to be linseed meal. *Held*, the firm was liable in an action of deceit: *Locke v. Stearns*, 1 Met. 560; 35 Am. Dec. 382. "The deceit," said Shaw, C. J., "was done for the defendant's benefit, by their agent acting under their orders in the conduct of their general business, and responsible to them; and when one party must suffer by the wrong and misconduct of another, it is more reasonable that he should sustain the loss who reposes the confidence in the agent, than he who has given no such confidence: *Hern v. Nichols*, 1 Salk. 289. The point is well illustrated by the law of insur-

ance, where the party is always held responsible *civiliter*, for the fraudulent misrepresentation or other deceit, or for the negligence, of his agent: *Fitzherbert v. Mather*, 1 Term Rep. 12. But the rule is not confined to cases of insurance, in relation to which a somewhat stricter morality, perhaps, is held to prevail; but it is laid down as a general rule of the common law, that the principal is civilly responsible for the acts of his agent: *Doe v. Martin*, 4 Term Rep. 60. In a late case, in which it was held that a master was liable for the acts of his servant in a case *quasi criminal*,—as for penalties incurred by a violation of the revenue laws,—it was taken for granted, on all sides, that for deceit in articles sold by a servant in the shop of his master, or for acts done in the manufacture of articles in the manufactory usually carried on by the master, the latter is answerable: *Attorney-General v. Siddon*, 1 Tyrw. 41; 1 Cramp. & J. 220. The rule proceeds upon the ground that the servant is acting within the scope of his authority, actual or constructive. The case of a sheriff who is liable *civiliter* even in an action of trespass, for the misconduct of his deputy, is another familiar application of the same rule: *Grinnell v. Phillips*, 1 Mass. 530. The rule is laid down generally, in a recent compilation of good authority, that though a principal, in general, is not liable criminally for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit, or other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts; but the wrongful or unlawful acts must be committed in the course of the agent's employment: 3 Chitty on Law of Commerce and Manufacturers, 209, 210."

or sale.¹ Where the agent, on behalf of his principal, performs an unauthorized act, yet if the principal has put the agent in a position to mislead innocent parties, he is responsible to them.² A principal who employs an agent to do an illegal act is responsible for any injury done, whether the agent acts ignorantly or knowingly.³ The owner of a yacht does not, by giving the master of the yacht the control of a gun and ammunition, become responsible for their careless use, it not being part of the master's duty to discharge the gun.⁴ A principal is likewise liable for the negligence of his agent.⁵

ILLUSTRATIONS. — A principal directed his agent to get a team of horses, intending that he should first obtain the owner's permission, which he, through a misunderstanding, failed to do, but took them without leave, and in using them killed one. *Held*, that the principal was liable for the value of the horse: *Moir v. Hopkins*, 16 Ill. 313; 63 Am. Dec. 312. An agent authorized to sell a flock of sheep sells a portion of it with knowledge that the sheep are diseased, and does not communicate the fact to the purchaser. The principals, though they have no actual notice of the fraud, are responsible in a civil action for damages to the purchaser: *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476. The plaintiff's mare jumped over the defendant's fence into his field. The defendant being away from home, his wife requested a relative to turn the mare out. After trying in vain to catch the mare, he threw a stone at her and broke her leg. *Held*, that the defendant was not liable for the injury; the act of violence by which the loss was occa-

¹ *Sandford v. Handy*, 23 Wend. 200; *North River Bank v. Aymar*, 3 Hill, 262; *Bennett v. Judson*, 21 N. Y. 238; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Law v. Grant*, 37 Wis. 548; *Graves v. Spier*, 58 Barb. 349; *Elwell v. Chamberlin*, 31 N. Y. 611; *Haskit v. Elliott*, 58 Ind. 493; *Bowers v. Johnson*, 18 Miss. 169; *Lawrence v. Hand*, 23 Miss. 103; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *National Life Ins. Co. v. Minch*, 5 Thomp. & C. 545; *Fogg v. Griffin*, 2 Allen, 1; *Upton v. Tribilcock*, 91 U. S. 45; *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678; *Tagg v. Tennessee Bank*, 9 Heisk. 479; *Eilenberger v. Mut. Ins. Co.*, 89 Pa. St. 464; *Veazie v. Williams*, 8 How. 134; *Hunter v. Hudson River Iron Co.*, 20 Barb. 507; *Tome v. Parkersburg etc. R. R. Co.*, 39 Md. 36; 17 Am. Rep. 540; *Henderson v. San Antonio R. R. Co.*, 17 Tex. 560; 67 Am. Dec. 675; *Wright v. Calhoun*, 19 Tex. 420.

² *Davidson v. Dallas*, 8 Cal. 227.

³ *Hynes v. Jungren*, 8 Kan. 391; *Enos v. Hamilton*, 24 Wis. 658.

⁴ *Haack v. Fearing*, 5 Rob. (N. Y.) 528.

⁵ *Kline v. R. R. Co.* 37 Cal. 400; 99 Am. Dec. 282. See Part V., Master and Servant, *post*, and Division III., Bailments.

sioned not being done in the execution of the authority given by the wife: *Cantrell v. Colwell*, 3 Head, 471. Defendant wrote to his clerk authorizing him to draw for \$75. The clerk altered the \$75 to \$175, showed the letter thus altered to plaintiff, who thereupon indorsed the clerk's draft for \$150. Plaintiff had to pay. *Held*, that he could recover \$75 of defendant: *Wilson v. Beardsley*, 20 Neb. 449. The owner of a farm, bound under the statute to build a division fence, intrusted the work to the occupant, who did it so improperly that horses on the adjoining farm were injured by the fence. *Held*, that the owner was liable: *Roney v. Aldrich*, 44 Hun, 320.

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CHAPTER XII.

DUTIES AND LIABILITIES OF THIRD PERSONS TO PRINCIPALS AND AGENTS.

- § 115. Rights of principal against third persons.
- § 116. Principal may enforce agent's contracts.
- § 117. Subject to frauds and misrepresentations.
- § 118. And equities.
- § 119. Contracts under seal.
- § 120. Exclusive credit given to agent.
- § 121. Principal may recover money wrongfully paid by agent.
- § 122. May sue for torts to his property in agent's hands.
- § 123. Agent ordinarily cannot sue on his contracts.
- § 124. Exceptions—When agent may sue.
- § 125. Agent's right to sue controllable by principal.

§ 115. Rights of Principal against Third Persons.—

The rights of the principal against third persons may be considered under four heads, viz.: 1. His right to sue upon contracts of the agent; 2. His right to recover money wrongfully paid or applied; 3. His right to follow property wrongfully conveyed; 4. His right to sue for torts generally.

§ 116. Principal may Enforce Agent's Contracts.—

The acts or contracts of an agent which bind his principal impose upon third parties corresponding obligations; and therefore the principal, whether disclosed or undisclosed, is entitled to the rights and benefits arising from such acts or contracts, and may enforce those rights by action against such third parties.¹ As soon as an

¹ *Miller v. Lea*, 35 Md. 396; 6 Am. Rep. 417; *Lamson Mfg. Co. v. Russell*, 112 Mass. 387; *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Beardsley v. Duntley*, 69 N. Y. 577; *Frazier v. Erie Bank*, 8 Watts & S. 18; *Conklin v. Leeds*, 58 Ill. 178; *Barker v. Garvey*, 83 Ill. 184; *Bassett v. Lederer*, 1 Hun, 274; *Barry v. Page*, 10 Gray, 398; *Brewster v. Saul*, 8 La. 296; *Graham v. Duckwall*, 8 Bush, 12; *Winchester v. Howard*, 97 Mass. 303; 93 Am. Dec. 93; *Hunter v. Giddings*, 97 Mass. 41; 93 Am. Dec. 54; *Culver v. Bigelow*, 43 Vt. 249; *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604; *Woodruff v. McGehee*, 30 Ga. 158; *Small v. Attwood*, 1 Younge, 407; *State v.*

agent has closed a contract and paid for property with his principal's money, the principal has the right to maintain an action in his own name on matters growing out of the transaction.¹ A principal's right to sue upon his agent's contract is established if the agent notifies the other party that he must account to the principal; such a notification operates as an equitable assignment of the agent's interest in the contract.² Notes payable to the order of an agent, and mortgages accompanying them, are transferable by the principal.³ Upon the sale of personal property by parol, the title may vest in an undisclosed principal for whom the apparent purchaser is negotiating as agent, and the principal, though unknown to the seller, may vindicate by suit in his own name his rights in the property.⁴ When an agent, duly authorized, sells property belonging to his principal, and gives the purchaser a receipt in his own name, without stating his agency, acknowledging the payment of part of the price, and promising to deliver the property at certain times,

Torinus, 26 Minn. 1; 37 Am. Rep. 395; *De Voss v. Richmond*, 18 Gratt. 338; 98 Am. Dec. 647; *Willard v. Buckingham*, 36 Conn. 395; *Machias Hotel Co. v. Coyle*, 35 Me. 405; *Wilson v. Codman*, 3 Cranch, 204; *Kelley v. Munson*, 7 Mass. 319; *Braden v. Louisiana Ins. Co.*, 1 La. 220; 20 Am. Dec. 277; *Earle v. De Witt*, 6 Allen, 531. (See *Weed v. Saratoga R. R. Co.*, 19 Wend. 534.) An agent in Boston of a principal in Maine sold goods to a person in Boston, disclosing his principal. The purchaser became insolvent, and was given a discharge under the state laws. *Held*, that this was no bar to an action by the principal for the price of the goods: *Isley v. Merriam*, 7 Cush. 242; 54 Am. Dec. 721. An agent makes proof of his principal's claim against the estate of a decedent. It is afterwards attached by a creditor of the agent. The principal can come in and prove his right to the claim as against a creditor: *Gage v. Stimson*, 26 Minn. 64. Thus a principal may sue in his own name on a non-negotiable note made in his behalf and

for his benefit, but payable to his agent: *National Life Ins. Co. v. Allen*, 116 Mass. 398. A note made to one as agent upon a consideration advanced by the principal may be sued on by the principal: *Bank of Genesee v. Patchin*, 19 N. Y. 312; *Alston v. Heartman*, 2 Ala. 699; *Garton v. Union City Bank*, 34 Mich. 279; *Pratt v. Topeka Bank*, 12 Kan. 570; and see note to *Arlington v. Hinds*, 1 D. Chip. 431, in 12 Am. Dec. 704, where all the cases are reviewed; *Newport Mechanics' Mfg. Co. v. Starbird*, 10 N. H. 123; 34 Am. Dec. 145.

¹ *Odessa Bank v. Jennings*, 18 Mo. App. 651. The right of the principal to assert his ownership in notes taken by his agent in disregard of instructions cannot be questioned, there being no intervening rights affected: *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254.

² *Dustin v. Radford*, 57 Mich. 163.

³ *Caldwell v. Meshew*, 44 Ark. 564.

⁴ *Tainter v. Lombard*, 53 Mo. 369; 87 Am. Dec. 552.

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places, and prices specified, the principal, on proving, by parol, his property and the authority of the agent, may maintain an action in his own name for the balance of the price, subject to any equities which the purchaser may have against the agent.¹ Such right is not affected by the fact that the agent also is entitled to sue,² or that the principal was unknown or undisclosed when the contract was made,³ or that the agent acts under a commission *del credere*.⁴

¹ *Huntington v. Knox*, 7 Cush. 371.

² *Evans on Agency*, 396; *Story on Agency*, sec. 420; *Beebe v. Robert*, 12 Wend. 413; 27 Am. Dec. 132; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 381; *Elkins v. Boston etc. R. R. Co.*, 19 N. H. 342; 51 Am. Dec. 184. The owner of goods which have been intrusted to an agent for a special purpose, and have been wrongfully sold by him, cannot maintain an action of contract against the purchaser for goods sold and delivered: *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227; 79 Am. Dec. 781.

³ *Evans on Agency*, 396; *Taintor v. Prendergast*, 3 Hill, 72; 33 Am. Dec. 618; *Isley v. Merriam*, 7 Cush. 242; 54 Am. Dec. 723; *Small v. Attwood*, 1 Younge, 407; *Bryant v. Wells*, 56 N. H. 153; *Walter v. Ross*, 2 Wash. C. C. 283; *Hicks v. Whitmore*, 12 Wend. 548; *Tutt v. Brown*, 5 Litt. 1; 15 Am. Dec. 33; *Gilpin v. Howell*, 5 Pa. St. 41; 45 Am. Dec. 720. In a lease for a year not under seal, after the name of the lessor were the words "agents as landlords." *Held*, that the real owners of the premises for whose benefit the lease was made might sue for the rent: *Nicoll v. Burke*, 78 N. Y. 580. "The principle is well settled that if the agent possess due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself as agent or not, or whether the principal be known or unknown, his principal may be made liable, and will be entitled to sue thereon in all cases, and the instrument may be resorted to for the purpose of ascertaining the terms of the agreement. This doctrine is fully sustained in *Briggs v. Partridge*, 64 N. Y.

357, 362, 364, 21 Am. Rep. 617, where the authorities bearing on the subject are cited and considered. See also *Story on Agency*, sec. 160. A different rule prevails as to sealed instruments; but where the contract is in writing or by parol, not under seal, in the name of the agent, and within his authority, the principal can enforce the same, and is liable thereon. The contract for the letting of the premises in question from year to year was not required to be in writing. The defendant understood that the agents were acting for others, and were liable to the principals. The particular phraseology used in the lease, describing the agents "as landlords," does not change the rule, or prevent its application to contracts not under seal. In fact, the counterpart of the lease not being produced, and it being no doubt in the defendant's possession, and it not appearing in what manner it was executed by the lessors, and the proof showing that the plaintiffs were the landlords and entitled to the rents, it was reasonable to assume that it was executed by their agents for their benefit and on their account. The cases cited by the learned counsel for the defendant to establish the doctrine that the lease, as it was, could only be enforced by the agents, do not sustain the principle contended for. Most of them relate to instruments under seal, and none of them hold that the principal cannot recover where the contract is made by the agent within his authority, either written or parol, when not under seal."

⁴ *Evans on Agency*, 396; *Story on Agency*, sec. 420; *Leverick v. Meigs*, 1 Cow. 645.

ILLUSTRATIONS.—Lumber is purchased and paid for by an agent in his own name by drafts on his principal, without disclosing his agency, and it falls short in quality. The principal may maintain an action in his own name for the over-payment made therefor: *Cushing v. Rice*, 46 Me. 303; 71 Am. Dec. 579. An agent purchased property on credit in the name and for the use of his principal, but the vendor, declining to give credit to the principal, took the agent's individual note for the property, which note was afterwards paid with the money of the principal. *Held*, that the principal might maintain an action in his own name against the vendor for a breach of warranty in the sale of the property: *White v. Owen*, 12 Vt. 361. An agent deposited money in bank as an ordinary deposit, stating at the time that it was the money of his principal, but desired the officer to place the money to his credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, and the agent died shortly afterwards insolvent. *Held*, that the principal was entitled to the fund, and might follow the same in a court of equity: *Whitley v. Foy*, 6 Jones Eq. 34; 78 Am. Dec. 236.

§ 117. Subject to Frauds and Misrepresentations.—

But this right is subject to the qualifications,—first, that it may be affected or modified by the declarations, misrepresentations, concealments, and fraud of the agent, whether authorized by or known to the principal, or not.¹

¹ Evans on Agency, 396; Demeritt v. Meserve, 39 N. H. 521; Barber v. Britton, 26 Vt. 112; Crump v. U. S. Mining Co., 7 Gratt. 352; 56 Am. Dec. 116; Morton v. Scull, 23 Ark. 289; Madison etc. R. R. Co. v. Norwich Sav. Soc., 24 Ind. 457; Mutual Benefit Co. v. Cannon, 48 Ind. 264; Elwell v. Chamberlin, 31 N. Y. 611; Sandford v. Handy, 23 Wend. 260; North River Bank v. Aymar, 3 Hill, 262; Bennett v. Judson, 21 N. Y. 238; Barry v. Page, 10 Gray, 398; Traub v. Milliken, 57 Me. 63; 2 Am. Rep. 14; Southern Ex. Co. v. Palmer, 48 Ga. 85. But see Lamm v. Port Deposit Home Ass'n, 49 Md. 233; 33 Am. Rep. 246; Kennedy v. McKay, 43 N. J. L. 288; 39 Am. Rep. 581; Thompson v. Phoenix Ins. Co., 75 Me. 55; 46 Am. Rep. 357; Aetna Ins. Co. v. Reed, 33

Ohio St. 283. In Veazie v. Williams, 8 How. 134, it was said: "If a principal ratify a sale by his agent and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed *in statu quo*; or they may, where the case and money are divisible, be at times relieved to the extent of the injury. The principal in such case is profiting by the acts of the agent, and is hence answerable *civiliter* for the acts of the agent, however innocent himself of any intent to defraud. . . . The test is, Was the purchaser deceived? and has the vendor adopted the sale made by deception and received the benefits of it? For if so, he takes the sale with all its burdens."

ILLUSTRATIONS.—An agent makes a compromise with creditors for his principal. The principal cannot take its benefits unless he adopts also all the representations made by the agent to the creditors in obtaining it: *Crans v. Hunter*, 28 N. Y. 389. A husband, as agent for his wife, by fraud procures an insurance on her life. The policy was paid to her representatives before discovery of the fraud. *Held*, that it could be recovered from them notwithstanding the wife was innocent of the fraud: *Mutual Life Ins. Co. v. Minch*, 5 Thomp. & C. 545; *Brown v. Hartford Ins. Co.*, 117 Mass. 479.

§ 118. And Equities.—Second, that where the principal was undisclosed, if he takes advantage of the agent's contracts, he does so subject to all the equities and rights of which the other contracting party might avail himself as against the agent,—i. e., had he been the principal.¹ "As the contract of the agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal. There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such cases be let in to all the equities, set-offs, and other defenses to which he would have been entitled if the action had been brought in the name of the agent."² Where the other contracting party knows he is dealing with the agent, the rule in the last paragraph does not apply, although he does not know who the particular principal is.³

¹ *Evans on Agency*, 396; *George v. Claggett*, 7 Term Rep. 359; *Peel v. Shepherd*, 58 Ga. 365; *Koch v. Willi*, 63 Ill. 144; *Culver v. Bigelow*, 43 Vt. 249; *Miller v. Lea*, 35 Md. 396; 6 Am. Rep. 417; *Traub v. Milliken*, 57 Me. 63; 2 Am. Rep. 14; *Eclipse Windmill Co. v. Thorson*, 46 Iowa, 181; *Merrick's Estate*, 5 Watts & S. 9; 2 Ashm. 485; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Pitts v. Mwer*, 18 Me. 361; 36 Am. Dec. 727.

² *Bigelow, J.* in *Barry v. Page*, 10 Gray, 398.

³ *Ladd v. Arkell*, 40 N. Y. Sup. Ct. 150; *Wilson v. Codman*, 3 Cranch, 204; *Graham v. Duckwall*, 8 Bush, 12; *Miller v. Lea*, 35 Md. 396; 6 Am. Rep. 417; *Saladin v. Mitchell*, 45 Ill. 79.

ILLUSTRATIONS. — A lent a sum of money to B. The money belonged to C, for whom it had been collected by A, but B did not know of C's interest. Afterwards C notified B to pay him the money, but B replied that A was indebted to him in a larger sum than the amount. *Held*, that B was entitled to retain the money as against C: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 286.

§ 119. **Contracts under Seal.** — Third, that a contract under seal in the name of an agent cannot be enforced by another on proof that the party named had oral authority to enter into the contract and acted as his agent.¹

§ 120. **Exclusive Credit Given to Agent.** — Fourth, that where an exclusive credit is given to and by the agent the principal cannot take advantage of it.²

§ 121. **Principal may Recover Money Wrongfully Paid by Agent.** — Where a man pays money by his agent which ought not to have been paid, either he or the agent may bring an action to recover it back.³ The right of a principal to follow property wrongfully converted or its proceeds rests on the principle that where a person's property has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced it will be held in its new form liable to the rights of its original owner.⁴ But where an agent to collect money lends it to his own creditor with-

¹ *Briggs v. Partridge*, 64 N. Y. 357; 21 Am. Rep. 617; *Bearsley v. Duntley*, 69 N. Y. 577; *Story on Agency*, sec. 422.

² *Evans on Agency*, 404; *Roosevelt v. Doherty*, 129 Mass. 301; 37 Am. Rep. 356; *Story on Agency*, sec. 423.

³ *Sadler v. Evans*, 4 Burr. 1984; *Stevenson v. Mortimer*, Cowp. 805; *Farmers' Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Sheffer v. Montgomery*, 65 Pa. St. 329; *Anchor v. Bank*, 2 Doug. 637; *Story on Agency*, sec. 435; *United States v. Bartlett*, Daveis, 9; *Bank of Kansas City v. Mills*, 24 Kan. 604. See *Bergenthal v. Fiebrantz*, 43 Wis. 435.

⁴ *Evans on Agency*, 406; *United States v. State Bank*, 96 U. S., 36; *Le Breton v. Peirce*, 2 Allen, 8; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. 7; 16 Am. Dec. 367; *Norris v. Tayloe*, 49 Ill. 17; *Bertholf v. Quinlan*, 68 Ill. 297; *Frazier v. Erie Bank*, 8 Watts & S. 18; *Cary v. Hotailing*, 1 Hill, 312; 37 Am. Dec. 323; *Proudford v. Wightman*, 78 Ill. 533; *Roach v. Turk*, 9 Heisk. 708; *Thompson v. Barnum*, 49 Iowa, 392; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393; *Farmers' Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Koch v. Willi*, 63 Ill. 114.

out informing him it was his principal's money, the principal cannot recover it of the creditor, even after notice that it belongs to him.¹ Where an agent lends his principal's money, taking a promissory note to himself, the note belongs to the principal, and the borrower may not pay the agent after he has been informed of the principal's superior right, and has received notice not to pay the agent.²

ILLUSTRATIONS.—A carrier of bank notes from A to B paid them out for a loss of his own at unlawful gaming. *Held*, that A might recover the amount of the person receiving them, with interest, in an action for money had and received: *Mason v. Waite*, 17 Mass. 560. The maker of a note not yet due persuaded a depository of it to accept a payment, and to give it up, contrary to his instructions from the holder. *Held*, that the holder could maintain trover for it against the maker, even if he had reason to think that the depository had authority to deliver it: *Kingman v. Pierce*, 17 Mass. 247. An agent paid his principal's money in discharge of A's debt. *Held*, that the principal had no cause of action against A, there being no privity between them from which an implied contract could arise: *Young v. Dibrell*, 7 Humph. 270.

§ 122. May Sue for Torts to his Property in Agent's Hands.—A principal may maintain an action against any one who wrongfully converts or injures his personal property while in his agent's hands.³

§ 123. Agent Ordinarily cannot Sue on his Contracts.—The general rule is, that an agent cannot maintain an action upon a contract made by him for his principal.⁴

¹ *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 286.

² *Farmers' Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215.

³ *Aikin v. Buck*, 1 Wend. 467; *Thorp v. Burling*, 11 Johns. 285; *Cary v. Hotailing*, 1 Hill, 312; 37 Am. Dec. 323; *Cutter v. Copeland*, 18 Me. 127; *Soper v. Sumner*, 5 Vt. 274; *Edwards v. Edwards*, 11 Vt. 537; 34 Am. Dec. 711; *Story on Agency*, secs. 436-440; *Southern Ex. Co. v. Palmer*, 48 Ga.

85; *White v. Dolliver*, 113 Mass. 400; 18 Am. Rep. 502.

⁴ *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Kert v. Bornstein*, 12 Allen, 342; *Gunn v. Cantine*, 10 Johns. 387; *Oakey v. Bend*, 3 Edw. Ch. 482; *Whitehead v. Potter*, 4 Ired. 257; *Jones v. Hart*, 1 Hen. & M. 470; *Jackson Ins. Co. v. Partee*, 9 Heisk. 296; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Fairlie v. Fenton*, L. R. 5 Ex. 169; *Pigott v.*

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"Ordinarily an agent contracting in the name of his principal, and not in his own name, is not entitled to sue, nor can he be sued on such contracts. Thus an agent selling the goods of his principal in his name and as his agent cannot ordinarily sue on the contract as for goods sold and delivered. This is clearly illustrated in the common case of a sale made by a clerk or shopman in a shop who has no right whatsoever to sue on the contract; but the right belongs exclusively to his superior or employer."¹ Nor when he has assumed the character of agent, when he is really the principal, without first notifying the other party of his real character.²

§ 124. **Exceptions—When Agent may Sue.**—But the agent may sue in his own name in the following cases, viz.: Where the agent has made the contract in his own name for an undisclosed principal;³ where he has a beneficial interest in the contract;⁴ as, for example, a factor⁵ or an auctioneer.⁶ An agent may sue in his own

Thompson, 3 Bos. & P. 147; *White v. Chouteau*, 10 Barb. 202; *Gray v. Pearson*, L. R. 5 Com. P. 568; *Thompson v. Fargo*, 63 N. Y. 479; *Bayley v. Onondaga Ins. Co.*, 6 Hill, 476; 41 Am. Dec. 759.

¹ Story on Agency, sec. 391.

² *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604; *Boulton v. Jones*, 2 Hurl. & N. 564; *Winchester v. Howard*, 97 Mass. 303; 93 Am. Dec. 93; *Bickerton v. Burrell*, 5 Maule & S. 383.

³ *Chandler v. Coe*, 54 N. H. 561; *Culver v. Bigelow*, 43 Vt. 249; *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Groover v. Warfield*, 50 Ga. 644; *Saladin v. Mitchell*, 45 Ill. 79; *Merrick's Estate*, 2 Ashm. 485; *Huntington v. Knox*, 7 Cush. 371; *Sims v. Bond*, 5 Barn. & Adol. 389; *Cooke v. Wilson*, 1 Com. B., N. S., 153, where *Crowder, J.*, said: "I have always understood the law to be that if a man signs a written contract he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only"; *Rayner v.*

Grote, 15 Mees. & W. 359; *Fairfield v. Adams*, 16 Pick. 381; *Beebe v. Robert*, 12 Wend. 413; 27 Am. Dec. 132; *Tyler v. Freeman*, 3 Cush. 261; *Sharp v. Jones*, 18 Ind. 314; 81 Am. Dec. 359; *Ludwig v. Gillespie*, 51 N. Y. Sup. Ct. 310. Where a contract not under seal is made with an agent in his own name, for an undisclosed principal, whether he has described himself as agent or not, either the agent or the principal may sue upon it: *Ludwig v. Gillespie*, 105 N. Y. 653. One who sells his principal's goods, not as agent, but as principal, may sue the buyer for the price: *Keown v. Vogel*, 25 Mo. App. 35.

⁴ *Toland v. Murray*, 18 Johns. 24; *Atkins v. Amber*, 2 Esp. 493; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Evrit v. Bancroft*, 22 Ohio St. 172; *Whitehead v. Potter*, 4 Ired. 257; *Bryan v. Wilson*, 27 Ala. 215; *Southern Exp. Co. v. Craft*, 49 Miss. 480; 19 Am. Rep. 4.

⁵ See Part IV., Factors.

⁶ See Part III., Auctioneers.

name on contracts made in his name in which he is interested, as for commissions, or by reason of a special property in the subject-matter. Among such agents are factors, brokers, carriers, auctioneers, a policy broker whose name is on the policy, and an agent who in his own name carries on a business for his principal, and appears to be proprietor, and sells goods in the trade as such apparent owner.¹ Thus an agent who is answerable to his principal generally, or who has made a contract beyond his authority on which he will be liable to his employer, has such a beneficial interest in the contract as to give him a right to sue on it in his own name.² An agent

¹ United States Telegraph Co. v. Gildersleve, 29 Md. 232; 96 Am. Dec. 519.

² Story on Agency, sec. 398. An agent who was employed to sell goods received cash for them, which he exchanged with B for a bill of larger denomination, which turned out to be counterfeit. Held, that he could recover back the money from B in his own name: Kent v. Bornstein, 12 Allen, 342. "The facts of this case," said Bigelow, C. J., "do not bring it within the familiar principle relied on by the defendant, that a mere agent or servant, with whom a contract, either express or implied, is entered into in behalf of another, and who has no beneficial interest in the transaction, cannot support an action thereon. The plaintiff had possession of money belonging to another, for a special purpose only. His authority was strictly limited. It was confined to the making of sales of goods in the store, and the payment of the money received therefor to a third person. He had no authority to deal with the money as his own, or to appropriate it for any purpose whatever. His duty was merely to receive it for goods which he might sell in the course of the day, and to hold it in his possession till the hour for the daily payment of it over to the sheriff's keeper arrived, when he was bound to pay it over to him. Any act or dealing with the money beyond this was outside of the scope of his employment. He had no authority

to enter into any contract concerning the money in his hands, or to exchange it for other money with third persons. An authority to receive the proceeds of sales in a shop did not empower the plaintiff to exchange the money received in small sums for bills of larger denominations with persons who made no purchases of goods. No evidence was offered to show any usage of business, either general or special, which would authorize the inference that the plaintiff's authority was extended beyond the precise terms of his employment, so as to embrace a transaction similar to that which he entered into with the defendant's agent. In this state of the evidence, it is clear that the plaintiff exceeded his authority in exchanging the smaller bills in his possession for one of the denomination of fifty dollars, and he is liable to his employer for the loss occasioned by his unauthorized act. It does not appear that the transaction has been ratified by the principal. For aught that we can know, the plaintiff is still liable for the amount of the genuine bills which he exchanged for the counterfeit one. It cannot therefore be said that the plaintiff has no beneficial interest in the cause of action on which this suit is brought. On the contrary, it plainly appears that his right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted to him."

holding negotiable paper payable to him as agent, or to bearer, or indorsed in blank, may sue on it in his own name.¹ So, where money is paid by the agent by mistake, or under an illegal contract. "Where a man pays money by his agent which ought not to have been paid, either the agent or principal may bring an action to recover it back: the agent may from the authority of the principal, and the principal may as proving it to have been paid by his agent."² Where the agent sues in his own name, the defendant may avail himself of all the defenses that would have been open to him had the suit been brought by the principal.³ An agent having a special or temporary property in goods, with a right to their possession, may maintain trespass, or trover, or conversion against a third person.⁴

ILLUSTRATIONS. — A contract of sale read, that "I, A, agent for B, agree to sell," etc., and "I, C, agree to buy," etc. No other mention of B's name was made, and it was signed by A in his own name, and by C. *Held*, A could sue in his own name for a breach: *Albany and Rensselaer Iron etc. Co. v. Lundberg*, 121 U. S. 451. A delivered B's coat in a bundle to a car-

¹ *Mauran v. Lamb*, 7 Cow. 174; *Buffum v. Chadwick*, 8 Mass. 103; *Fairfield v. Adams*, 16 Pick. 351; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Considerant v. Brisbane*, 22 N. Y. 393; *Van Staphorst v. Pearce*, 4 Mass. 258; *Fish v. Jacobsohn*, 1 Keyes, 539; *Johnson v. Catlin*, 27 Vt. 89; 62 Am. Dec. 622; *Jackson v. Heath*, 1 Bail. 355; *Moore v. Penn*, 5 Ala. 135; *Blanchard v. Page*, 8 Gray, 281; *Griffith v. Ingledew*, 6 Serg. & R. 429; 9 Am. Dec. 444; *Hamilton v. Vought*, 34 N. J. L. 187; *Dugan v. United States*, 3 Wheat. 176; *Guernsey v. Burns*, 25 Wend. 412; *Brigham v. Marean*, 7 Pick. 40; *Commercial Bank v. French*, 21 Pick. 486; 32 Am. Dec. 280; *Fisher v. Ellis*, 3 Pick. 322; *Binney v. Plumley*, 5 Vt. 500; 26 Am. Dec. 313; *McHenry v. Ridgely*, 2 Scam. 309; 35 Am. Dec. 110; *Doe v. Thompson*, 22 N. H. 217; *Wheelock v. Wheelock*, 5 Vt. 433; *Clap v. Day*, 2 Me. 305; 11 Am. Dec. 99; *Goodman v. Walker*, 30 Ala. 482;

68 Am. Dec. 134; *Pierce v. Robie*, 39 Me. 205; 63 Am. Dec. 614; *Rutland etc. R. R. Co. v. Cole*, 24 Vt. 37; *Potter v. Yale College*, 8 Conn. 52; *Porter v. Nekervis*, 4 Rand. 359; *Poor v. Guilford*, 10 N. Y. 273; 61 Am. Dec. 749.

² *Lord Mansfield, C. J.*, in *Drinkwater v. Goodwin*, Cowp. 251; *Kent v. Bornstein*, 12 Allen, 342; *Oom v. Bruce*, 12 East, 225; *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 236. See *Hungerford v. Scott*, 37 Wis. 341.

³ *Gibson v. Winter*, 5 Barn. & Ald. 96; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Hogan v. Shorb*, 24 Wend. 458.

⁴ *Evans on Agency*, 389; *Robinson v. Webb*, 11 Bush, 464; *Heard v. Brewer*, 4 Daly, 136; *Bass v. Pierce*, 16 Barb. 595; *Faulkner v. Brown*, 13 Wend. 63; *Beyer v. Bush*, 50 Ala. 19; *Story on Agency*, secs. 414 et seq.

rier. The bundle was lost. *Held*, that A might bring an action against the carrier: *Elkins v. Boston etc. R. R. Co.*, 19 N. H. 337; 51 Am. Dec. 184.¹

§ 125. Agent's Right to Sue Controllable by Principal.

—The right of the agent to sue is subordinate to and controllable by the principal. Where the principal as well as the agent has a right to sue upon a contract made by the latter, he may generally supersede the right of the agent to sue by suing in his own name.²

¹ "The principle," said the court, "appears to be settled that if it is not expressed that an agent contracts in behalf of another, and the name of the principal is not disclosed by him, a suit may be maintained in the name of the principal. In the present case Jonathan Elkins was clearly the agent of the plaintiff, and the name of the plaintiff was not disclosed by him. This principle is recognized in the case of *Sims v. Bond*, 5 Barn. & Adol. 389, where Lord Denman says: 'It is a well-established rule of law that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party.' In the case of *Higgins v. Senior*, 8 Mees. & W. 834, it was held that the suit might be maintained on the contract either in the name of the principal or of the agent, and that, too, although required to be in writing by the statute of frauds: *Beebe v. Robert*, 12 Wend. 413; 27 Am. Dec. 132; *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618. The same principal was adopted by the supreme court of the United States in the memorable case of the loss of the steamer *Lexington* in Long Island Sound. In the case of *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. 344, the bank had delivered to Harnden, an express agent, a large

amount of specie for transportation, by whom it was delivered to the Steam Navigation Company, who were then running the *Lexington* between New York and Stonington. It was held that, notwithstanding the contract of affreightment was made by Harnden with the company personally for the transportation of the specie, it was, in contemplation of law, a contract between the bank and the company, and although Harnden made the contract in his name, and without disclosing the name of his employers at the time, the bank might maintain a suit upon the contract directly against the company. So where the plaintiff agreed with B, a common carrier, for the carriage of goods, and B, without the plaintiff's directions, agreed for the carriage with C, who, without the plaintiff's knowledge, agreed with D, a third carrier, it was held that the plaintiff might maintain an action against D for not delivering the goods, and that by bringing the action, the plaintiff affirmed the contract made with D by C, and could not afterwards recover from B: *Sanderson v. Lamber-ton*, 6 Binn. 129."

² Story on Agency, sec. 403; *Sadler v. Leigh*, 4 Camp. 194; *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Girard v. Taggart*, 6 Serg. & R. 27; 9 Am. Dec. 327; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Morris v. Cleasby*, 1 Maule & S. 576; *Coppin v. Walker*, 7 Taunt. 237; *Walter v. Ross*, 2 Wash. C. C. 283; *Hubbert v. Borden*, 6 Whart. 79.

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PART II.—ATTORNEY AND CLIENT.

CHAPTER XIII.

THE ADMISSION AND REMOVAL OF ATTORNEYS.

- § 126. Attorneys defined.
- § 127. Admission to the bar — License essential to practice.
- § 128. Office of attorney — Nature of the office.
- § 129. Power of court to disbar attorneys.
- § 130. Causes good grounds for disbarment.
- § 131. Causes not ground for disbarment.
- § 132. Suspension for a time.
- § 133. Previous conviction not necessary.
- § 134. Practice on disbarment proceeding — Proof — Appeal.
- § 135. *Mandamus* to restore attorney.
- § 136. Readmission after disbarment.

§ 126. **Attorneys Defined.**—In England there are different divisions of lawyers,—sergeants, queen's counsel, barristers, attorneys, proctors, solicitors, etc. The members of these different divisions have certain privileges and distinctions peculiar to their order. A barrister cannot draw papers or do the work of an attorney; an attorney cannot appear in court and plead the cause of his client. No such class distinction prevails in the American states. With us, the same person may fulfill the duties of both the English barrister and attorney. The term "attorney at law" is therefore a general title, embracing all persons who are skilled in the law, and duly authorized to represent others in litigation and in legal matters.¹ The word "attorney" will be construed to mean attorney at law when not coupled with any word of qualification.² The office of attorney, in its professional signification, is not known in justices' courts³ nor in a surrogate court in New York.⁴

¹ Wharton on Agency, sec. 555.

² Bailey v. Delaplaine, 1 Sand. 11;

³ Ingram v. Richardson, 2 La. Ann. 839; Fox v. Jackson, 8 Barb. 355.

⁴ Cullen v. Miller, 9 N. Y. Leg. Obs. contra, Hall v. Sawyer, 47 Barb. 116. 62.

§ 127. Admission to the Bar—License Essential to Practice.—A person cannot hold himself out as a practitioner of law without a license to do so issued by some competent authority,—generally a court of justice, appellate or of original jurisdiction.¹ A license granted by the highest court of a state gives authority to practice in all the courts of that state, while a license given by an inferior court extends only to practice in that particular court.² This license is usually granted after an examination as to the applicant's knowledge of the law, or as to his possessing the qualifications required by statute. The statutes of the different states prescribe these qualifications.³ One who is not licensed to practice as an attorney, but represents himself to be one, and is employed and acts as such, cannot recover for his services by declaring on them as those of an agent only.⁴ A statute making the diploma of a law school conclusive evidence of the learning and ability of the possessor is valid;⁵ but a statute is not which admits to the practice of law any person of good moral character.⁶ An unlicensed attorney cannot sue for fees, nor can the firm of which he is a member, though the other partners are licensed.⁷ The term of the office is for life, during good behavior.⁸ The order of a court admit-

¹ *Robb v. Smith*, 4 Ill. 46; *McKoan v. Devries*, 3 Barb. 196; *Thorn v. Lawson*, 6 Tex. 240; *In re Pratt*, 13 How. Pr. 1.

² *Weeks on Attorneys*, sec. 23; *Withers v. State*, 36 Ala. 252; *Osborn v. United States Bank*, 9 Wheat. 738.

³ See *Weeks on Attorneys*, secs. 60-76; *In re Pratt*, 13 How. Pr. 1; *In re A. B.*, 5 N. Y. Leg. Obs. 136; *In re Graduates*, 11 Abb. Pr. 301; 20 How. Pr. 1; 10 Abb. Pr. 357; 19 How. Pr. 136; *People v. Hallett*, 1 Col. 352.

⁴ *Tedrick v. Hiner*, 61 Ill. 190.

⁵ *In re Cooper*, 22 N. Y. 67.

⁶ *McKoan v. Devries*, 3 Barb. 196; *Devries ads. McKoan*, 6 N. Y. Leg. Obs. 203; *Bullard v. Van Tassell*, 3 How. Pr. 402; see *Roy v. Harley*, 1 Duer, 637.

⁷ *Hittson v. Browne*, 3 Col. 304.

⁸ "And his office is an office for life. . . . The grant of an office without express limitation at common law, being taken most strongly against the grantor, endures for the life of the grantee; and though this principle has not been applied to offices within the grant of the executive, it must necessarily be applied to the office of attorney, for to subject the members of the profession to removal at the pleasure of the court would leave them too small a share of the independence necessary to the duties they are called to to perform to their clients and to the public": *Case of Austin*, 5 Rawle, 191; 28 Am. Dec. 657; *Richardson v. Brooklyn City R. R. Co.*, 22 How. Pr. 368.

ting an attorney to practice is an adjudication that he was of "good moral character" at that time.¹ If the court finds the applicant not to possess the "character or learning" required by statute, its decision is not reviewable on appeal.² Nor is the decision of the court that his qualifications are sufficient appealable from.³ The decision of the court that he is not entitled to admission is reviewable on appeal, but is not the subject of *mandamus*.⁴ An attorney cannot have his name enrolled *nunc pro tunc* as of the day of his license.⁵ He cannot be admitted without personally appearing before the court.⁶ He may be examined as to his professional qualifications, even though he is a member of the bar of another state or of the supreme federal court.⁷ The statutory provision that an attorney of another state may be admitted on the production of his license does not take away the power of the court to inquire as to his still being a member of the bar, and as to his standing and moral character.⁸ A rule requiring a candidate for admission to the bar to serve a clerkship of four years with a practicing attorney is not complied with by studying law with an attorney for that time; he must actually assist him in the office practice.⁹ But a service

¹ In re Lowenthal, 61 Cal. 122.

² In re Beggs, 67 N. Y. 120.

³ State v. Johnston, 2 Har. & M. 160.

⁴ Commonwealth v. Judges, 1 Serg. & R. 187; Strother v. Missouri, 1 Mo. 605; Ex parte Garland, 4 Wall. 378; In re Cooper, 22 N. Y. 67; Ex parte Secombe, 19 How. 9; Bradwell v. State, 16 Wall. 133.

⁵ Ex parte Fellows, 3 Ill. 369.

⁶ Ex parte Snelling, 44 Cal. 553.

⁷ Ex parte Snelling, 44 Cal. 553. A lawyer from another state may become, by practicing without being admitted, a *de facto* attorney, so that his acts will be valid: Garrison v. McGowan, 48 Cal. 598.

⁸ In re Lowenthal, 61 Cal. 122.

⁹ In re Dunn, 43 N. J. L. 359; 39 Am. Rep. 600; the court saying: "Whether an applicant has studied sufficiently is left by our rules to be determined upon the examination

which he must undergo; and altogether aside from that question is the inquiry whether he has served the necessary clerkship. The substance of this prerequisite it is not difficult to perceive. A clerkship to an attorney imports the office of assistant to an attorney, an actual occupation in and about the attorney's business and under his control. The service is to be rendered, not solely or mainly by the study of law-books, but chiefly by attending to the work of the attorney under his direction. The purpose of the rule is, that the clerk shall be actually engaged in the practice of law under the guidance of his master for the stated period, so that by direct contact with an attorney's duties he may acquire the skill and facility in the profession which are necessary for enabling him to protect and promote independently the interests that clients

with a judge of a court is a service with a "practicing attorney or gentleman of the law."¹ The right to practice law does not depend on United States citizenship.² Women are not eligible to hold the office of attorney at law,³ nor non-residents of the state,⁴ nor unnaturalized foreigners,⁵ nor a circuit judge,⁶ nor a master in chancery,⁷ nor the clerk of the court.⁸

§ 128. **Office of Attorney—Nature of the Office.**—An attorney at law does not hold an "office of trust, civil or military," within those words in a statute,⁹ nor is he an "officer" or "public officer."¹⁰ He cannot be excluded from his profession for past misconduct,—as, for example, bearing arms against the United States,¹¹ or having fought a duel,¹²—unless it seems that the past conduct shows him to be a person not of "good moral character."¹³ The fact, however, that the attorney is not qualified does not render void—as against the client—the proceedings taken by him.¹⁴ A license granted by a court to an attorney to practice law is not a contract between him and the state

may afterwards commit to him. This is the sole object of requiring the clerkship to be served with a practicing attorney. For the mere study of legal principles, a retired counselor or a professor would be an apter guide."

¹ *Commonwealth v. Judges, 1 Serg. & R. 187.*

² *Bradwell v. State, 16 Wall. 130.*

³ *In re Bradwell, 55 Ill. 535; Bradwell v. State, 16 Wall. 130; In re Lockwood, 9 Nott & H. 346; In re Goodell, 39 Wis. 232; 20 Am. Rep. 42; Robinson's Case, 131 Mass. 376; 41 Am. Rep. 239; contra, In re Hall, 50 Conn. 131; 47 Am. Rep. 625; In re Leonard, 12 Or. 93; 53 Am. Rep. 323. By statute in several states this privilege is now granted to women.*

⁴ *In re Mosness, 39 Wis. 520; 20 Am. Rep. 55; In re Henry ads. Snyder, 40 N. Y. 560; Richardson v. Brooklyn R. R. Co., 22 How. Pr. 368.*

⁵ *Ex parte Thompson, 3 Hawks, 355; 1 Johns. 528; In re O'Neill, 90 N. Y. 584; contra, In re Emmet, 2 Caines, 387.*

⁶ *Hobby v. Smith, 1 Cow. 588; Seymour v. Ellison, 2 Cow. 13.*

⁷ *Anonymous, Tayl. 6.*

⁸ *Collins's Case, 2 Va. Cas. 222.*

⁹ *Ex parte Faulkner, 1 W. Va. 269; Cohen v. Wright, 22 Cal. 294; Ex parte Yale, 24 Cal. 241; 85 Am. Dec. 62.*

¹⁰ *Ingersoll v. Howard, 1 Heisk. 247; Champion v. State, 3 Cold. 114; Ex parte Garland, 4 Wall. 333; Byrne v. Stewart, 3 Desaus. Eq. 466; Leigh's Case, 1 Munf. 468. See Waters v. Whittemore, 22 Barb. 595.*

¹¹ *Ex parte Garland, 4 Wall. 333; Ex parte Law, 35 Ga. 285; Ex parte Tenney, 2 Duvall, 351.*

¹² *In re Dorsey, 7 Port. 293. See In re Wood, 1 Hopk. Ch. 6; Leigh's Case, 1 Munf. 468.*

¹³ *As, for instance, where he has been convicted of larceny: Attorneys' License, 21 N. J. L. 345.*

¹⁴ *Peterson v. Parriott, 4 W. Va. 42; Weeks on Attorneys, sec. 43; Garrison v. McGowan, 48 Cal. 598.*

which the legislature cannot interfere with.¹ It may be revoked, or additional conditions may be placed upon its exercise.² So the exercise of its profession may be taxed, and a penalty enforced upon its exercise without such payment.³ The requirement of a license tax for carrying on the profession of attorney at law does not conflict with a constitutional provision that taxation upon property shall be in exact proportion to its value.⁴

§ 129. **Power of Court to Disbar Attorneys.**—The summary jurisdiction of the court over an attorney may be exercised to the extent of taking away his office,—disbarring him, striking his name from the rolls. Such a power is necessary to protect the court itself, the administration of justice, and the public from imposition and fraud. It is exercised, not by way of punishment,—the attorney may also be punished in the proper tribunals if his acts amount to a crime,—but to remove from the exercise of professional privileges those who are unworthy of them. “The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them.”⁵ The license of an attorney, obtained without authority of law, may be revoked in a summary proceeding.⁶ “It is difficult,” says Taney, C. J., “if not

¹ *Simmons v. State*, 12 Mo. 268; 49 Am. Dec. 131; *State v. Lackland*, 12 Mo. 279; *State v. Garesche*, 36 Mo. 261.

² *Id.* In *People v. Walbridge*, 6 Cow. 512, the constitutionality of a statute prohibiting attorneys from buying negotiable paper was attacked. But the court held it constitutional.

³ *Simmons v. State*, 12 Mo. 268; 49 Am. Dec. 131; *Cousins v. State*, 50 Ala. 113; 20 Am. Rep. 290; *St. Louis v. Sternberg*, 8 Cent. L. J. 8; *Goldthwaite v. City Council*, 50 Ala. 486; *Stewart v. Potts*, 49 Miss. 479; *State v. King*, 21 La. Ann. 201; *State v. Waples*, 12 La. Ann. 343; *Egan v. St. Charles Court*, 3 Har. & McH.

169; *Ould v. City of Richmond*, 23 Gratt. 464; 14 Am. Rep. 139; *contra*, *Lawyer's Tax Cases*, 8 Heisk. 565. Each member of a firm must pay the license fee: *Jones v. Paige*, 44 Ala. 657.

⁴ *McCaskell v. State*, 53 Ala. 510.
⁵ *Ex parte Wall*, *post*; *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 293.

⁶ *In re Burchard*, 27 Hun. 429. In *Ex parte Wall*, 107 U. S. 265, it is said: “It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys, to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct.”

impossible, to enumerate and define with legal precision every offense for which an attorney or counselor ought to be removed; and the legislature for the most part can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise."¹ The power to disbar is inherent in the court, and need not be given (though it may be regulated) by statute.² Where grounds of disbar-

and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his professional character. In Archbold's Practice, edition by Chitty, p. 148, it is said: 'The court will, in general, interfere in this summary way, to strike an attorney off the roll or otherwise punish him for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character.' And it is laid down by Tidd, that 'where an attorney has been fraudulently admitted, or convicted (after admission) of felony, or other offense which renders him unfit to be continued an attorney, or has knowingly suffered his name to be made use of by an unqualified person, or acted as agent for such person, or has signed a fictitious name to a demurrer, as and for the signature of a barrister, or otherwise grossly misbehaved himself, the court will order him to be struck off the roll': 1 Tidd's Prac., 9th ed., 89. Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was, nevertheless, struck from the roll. 'The question is,' said Lord

Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll, or not.'

¹ Ex parte Secombe, 19 How. 9.
² State v. Winton, 11 Or. 456; 50 Am. Rep. 486; Ex parte Wall, 107 U. S. 265; People v. Palmer, 61 Ill. 255; State v. Burr, 19 Neb. 593; United States v. Porter, 2 Cranch C. C. 60; Cohen v. Wright, 22 Cal. 293; In re Davies, 93 Pa. St. 116; 39 Am. Rep. 729; In re Goodrich, 79 Ill. 148; Penobscot Bar v. Kimball, 64 Me. 140; In re Woolley, 11 Bush, 95; Merritt v. Lambert, 10 Paige, 356; Ex parte Smith, 28 Ind. 47; Ex parte Brown, 2 Miss. 303; In re Bowman, 8 Cent. L. J. 250; State v. Kirke, 12 Fla. 278; 95 Am. Dec. 314; Bradley v. Fisher, 13 Wall. 335; Ex parte Cole, 1 McCrary, 405; Baker v. Commonwealth, 10 Bush, 592. The St. Louis criminal court cannot disbar an attorney, nor suspend him from practice. Under the statute, this power is vested only in the supreme court, the St. Louis court of appeals, and the several circuit courts: State v. Laughlin, 73 Mo. 443. Under the Illinois statute giving the supreme court exclusive power to strike from the roll the name of an attorney for malpractice, the circuit court can only suspend him from practice till the next term of the supreme court. And the order of suspension must be rescinded if the supreme court then make no movement to strike him from the roll: Winkelman v. People, 50 Ill. 449. Disbarred attorneys can no

ment are specified by statute, this does not exclude the power of the court to disbar for good grounds not mentioned.¹ An attorney struck from the roll of one court will not be admitted in any other,² or be allowed to act for a party by letter of attorney.³ In New York it is held that conviction of a felony forfeits the attorney's office and his right to practice, without an order of court removing him.⁴ The disbarment of an attorney by a county court in Florida does not affect his *status* in other courts.⁵ In Illinois, a circuit court can only suspend, the supreme court must disbar.⁶ The United States supreme court has refused to consider the fact that a member of the bar of the supreme court of a state has been struck from the rolls of a federal district court of that state, as a reason for not admitting him to the bar of the United States supreme court.⁷ An attorney may be removed from the rolls at his own request.⁸ It is no bar to the court's proceeding to disbar for wrongfully retaining money belonging to a client, that the attorney, after the proceedings were commenced, has paid over the money.⁹ Nor can

longer appear as attorneys in any court of record in Michigan, nor represent any person in court as attorney, agent, or otherwise: *Cobb v. Grand Rapids Superior Judge*, 43 Mich. 289.

¹ In *re Mills*, 1 Mich. 392; *Ohio v. Chapman*, 11 Ohio, 430; *Beene v. State*, 22 Ark. 157; In *re Bowman*, 8 Cent. L. J. 250; *contra*, *Ex parte Smith*, 28 Ind. 47; *Redman v. State*, 28 Ind. 205; *Kane v. Haywood*, 66 N. C. 1. In *Ex parte Secombe*, 19 How. 9, Taney, C. J., says: "It is true that in the statutes of Minnesota rules are prescribed for the admission of attorney and counselors, and also for their removal. But it will appear upon examination that in describing some of the offenses for which they may be removed the statute has done but little, if anything, more than enact the general rules upon which the courts of law have always acted, and have not in any material degree narrowed the discretion they exercised. Indeed, it is difficult, if not impossible, to enu-

merate and define with legal precision every offense for which an attorney or counselor ought to be removed. And the legislature for the most part can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise."

² In *re Smith*, 4 Moore, 319; In *re Peterson*, 3 Paige, 510.

³ *Paul v. Purcell*, 1 Browne, 348.

⁴ In *re Niles*, 5 Daly, 465.

⁵ *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314.

⁶ *Winkelman v. People*, 50 Ill. 449.

⁷ In *re Tillinghast*, 4 Pet. 109.

⁸ See *People v. Walbridge*, 8 Cow. 512; *Scott v. Van Alstyne*, 9 Johns. 216.

⁹ *People v. Ryalls*, 8 Col. 332; 21 Cent. L. J. 71. The court said: "After service of the rule in this case as required by law, respondent paid the money wrongfully withheld; also the costs of this proceeding. It seems to have been understood

the proceedings be dismissed on the motion of the accuser.¹

§ 130. Causes Good Grounds for Disbarment.—An attorney has been disbarred for absence of good moral character;² accusing the court in a petition for rehearing of neglecting the consideration of the law, and not studying the facts of the case;³ appropriating or wrong-

that the proceeding would then be dismissed by relator, as respondent made no answer, took no steps to defend against the charge, and departed from the state. We decline to discharge the rule, and have heard the evidence touching the matters averred in the petition. It seems to have been assumed in the present and several similar cases recently brought in this court that the statute mentioned was framed to aid clients in collecting moneys thus wrongfully withheld by their attorneys. Doubtless the proceeding will tend to accomplish this purpose, for two reasons: first, an attorney must be lost to all sense of honor as well as professional pride, who would not thereby be stimulated to relieve himself from the odium attaching to his breach of trust; and second, payment of the money, even though under an influence akin to coercion, would probably have some bearing upon the decision of this court on the question of disbarment. But we do not conceive that the statute referred to was adopted for the purpose of affording an additional private remedy for the collection of the moneys mentioned. In our opinion, the principal object of the legislature was to place in the hands of this court an additional means whereby the profession may be purged of unworthy members, and litigants generally be protected from impositions practiced by such persons. As supporting this view, it may be suggested that without the statute at common law the client possessed quite as effective a remedy for the wrong under consideration; he might obtain from the court a rule requiring the attorney to pay over the moneys kept back, and upon disobedience of the rule the proper practice

was not to move for disbarment, but to procure an attachment for the contempt: *Weeks on Attorneys*, sec. 97."

¹ *In re Knott*, 71 Cal, 584.

² *Percy's Case*, 36 N. Y. 651, where it is said: "It has been seen that the right of admission to practice is made, both by the constitution and statute, to depend upon the possession of a good moral character, joined with the requisite learning and ability. It is equally important that this character should be preserved, after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of life tenure, while no provision for removal is made in case such character is wholly lost." *People v. Palmer*, 61 Ill. 255; *Walker v. Commonwealth*, 8 Bush, 86; *Dickinson v. Dustin*, 21 Mich. 561; *In re Peterson*, 3 Paige, 510; *Anonymous*, 22 Wend. 656.

³ *In re Woolley*, 11 Bush, 95, the court saying: "An attorney may unfit himself for the practice of his profession by the manner in which he conducts himself in his intercourse with the courts. He may be honest and capable, and yet he may so conduct himself as to continually interrupt the business of the courts in which he practices; or he may, by a systematic and continuous course of conduct, render it impossible for the courts to preserve their self-respect and the respect of the public, and at the same time permit him to act as an officer and attorney. An attorney who thus studiously and systematically attempts to bring the tribunals of justice into contempt is an unfit person to hold the position and exercise the privileges of an officer of those tribunals. An

fully retaining his client's money;¹ altering a letter written by the judge to the clerk;² or a receipt;³ advising and encouraging a lynching;⁴ abusing a judge in the street concerning his judicial action in a case pending before him;⁵ bad faith towards the court;⁶ deceiving and imposing upon the court;⁷ conviction of such crimes as the law regards as infamous;⁸ disloyal or treasonable acts;⁹ colluding with the wife in a divorce case to manufacture evidence;¹⁰ or to obtain a divorce without authority;¹¹ or forging a pretended divorce;¹² or advertising to procure divorces without publicity;¹³ embezzling his client's money;¹⁴ fighting a duel;¹⁵ forging an affidavit for a change of venue;¹⁶ fraudulent conduct not criminal;¹⁷ getting the opposite attorney drunk;¹⁸ making a false professional statement;¹⁹ or a false statement in writing not sworn to;²⁰

open, notorious, and public insult to the highest judicial tribunal of the state, for which an attorney refuses in any way to atone, may justify the refusal of that tribunal to recognize him in the future as one of its officers; and in a proceeding against him for contempt, if the contumacy be therein manifested, there is no reason why the order revoking his authority until he does comply with the reasonable requirements of the court may not be made."

¹ *Jeffries v. Laurie*, 27 Fed. Rep. 195; *In re Treadwell*, 67 Cal. 353; *People v. Ryalls*, 8 Col. 332; *Ex parte Brown*, 2 Col. 553; *Dawson v. Compton*, 7 Blackf. 421; *Hynman v. Washington*, 2 McCord, 493; *People v. Smith*, 3 Caines, 221; *In re Bleakley*, 5 Paige, 311; *People v. Palmer*, 61 Ill. 255. See *Guilford v. Sims*, 13 Com. B. 370. The United States circuit court will disbar and commit for contempt an attorney who disobeys the order of the court to pay over to his client money collected by suit in that court: *Jeffries v. Laurie*, 27 Fed. Rep. 195. Such imprisonment is not the "imprisonment for debt" which the Missouri constitution prohibits. Nor is it material that the attorney has no money: *Jeffries v. Laurie*, 27 Fed. Rep. 198. By convert-

ing money collected for his client, an attorney violates "his duties as such attorney," within the California Code of Civil Procedure, section 287, specifying the grounds of disbarment: *In re Treadwell*, 67 Cal. 353.

² *Baker v. Commonwealth*, 10 Bush, 592.

³ *In re Serfass*, 116 Pa. St. 455.

⁴ *Ex parte Wall*, 107 U. S. 265.

⁵ *People v. Green*, 7 Col. 237; 49 Am. Rep. 351.

⁶ *Ex parte Deringer*, 4 Week. Not. Cas. 200.

⁷ *In re Loew*, 5 Hun, 462.

⁸ *In re McCarthy*, 42 Mich. 71.

⁹ *Cohen v. Wright*, 22 Cal. 293.

¹⁰ *In re Gale*, 75 N. Y. 527.

¹¹ *Dillon v. State*, 6 Tex. 55.

¹² *In re Peterson*, 3 Paige, 510.

¹³ *In re Goodrich*, 79 Ill. 148.

¹⁴ *In re Davies*, 93 Pa. St. 116; 39 Am. Rep. 729.

¹⁵ *Smith v. State*, 1 Yerg. 228.

¹⁶ *Ex parte Walls*, 64 Ind. 461.

¹⁷ *United States v. Porter*, 2 Cranch C. C. 60; *In re Peterson*, 3 Paige, 510; *In re Attorneys' License*, 21 N. J. L. 345; *People v. Ford*, 54 Ill. 520.

¹⁸ *Dickens's Case*, 67 Pa. St. 169.

¹⁹ *Perry v. State*, 3 G. Greene, 550.

²⁰ *In re Keegan*, 31 Fed. Rep. 129.

obtaining admission to the bar through fraud;¹ obtaining money by false pretenses;² obliterating a record or antedating a writ to avoid the effect of the statute of limitations;³ preparing, advising a client to verify, and filing in court a complaint alleging things as true which he knew to be false;⁴ proposing to a client to influence the judge's action in his case by visiting him at his home and getting his opinion beforehand, or inducing newspapers to attack him;⁵ procuring deeds of property from persons in distress;⁶ procuring, by false pretenses, a debt due his client, to be paid to himself, and attempting to retain it for his services;⁷ committing perjury;⁸ subornation of perjury;⁹ substituting the name of his client for his own in an affidavit for a change of venue;¹⁰ retaining and failing to pay over money collected;¹¹ taking fees on both sides of a case;¹² threatening a judge with personal violence during a trial, though out of court;¹³ tampering with jurors.¹⁴ "Misdemeanor in his professional capacity" means professional misdemeanor, and not a misdemeanor punishable by fine or imprisonment.¹⁵

ILLUSTRATIONS.—An attorney obtained the confidence of a weak-minded man, who was possessed of an hallucination that he was in danger of apprehension for imaginary crimes com-

¹ *Ex parte Hill*, 11 L. J., N. S., 329; *Anonymous*, 2 Barn. & Adol. 766; *In re Lowenthal*, 61 Cal. 122.

² *Penobscot v. Kimball*, 64 Me. 140; *State v. Winton*, 11 Or. 456; 50 Am. Rep. 486; *People v. Ford*, 54 Ill. 520.

³ *Ex parte Brown*, 2 Miss. 303.

⁴ *People v. Pearson*, 55 Cal. 472.

⁵ *Ex parte Cole*, 1 McCrary, 405.

⁶ *Ex parte Burr*, 2 Cranch C. C. 379.

⁷ *People v. Murphy*, 119 Ill. 159.

⁸ *In re Percy*, 36 N. Y. 651.

⁹ *State v. Holding*, 1 McCord, 379; *In re Eldridge*, 82 N. Y. 161; 37 Am. Rep. 558.

¹⁰ *People v. Leary*, 84 Ill. 190.

¹¹ *Weeks on Attorney*, sec. 81; *People v. Cole*, 84 Ill. 327; *People v. Palmer*, 61 Ill. 255; *Klingensmith v.*

Kepler, 41 Ind. 341; *Slemmer v. Wright*, 54 Iowa, 164; *In re Buchanan*, 28 Mo. App. 230.

¹² *In re Bowman*, 8 Cent. L. J. 250. See *Jackson v. State*, 21 Tex. 668. An accusation that respondent urged a prosecution for libel and promised to secure satisfactory evidence of the guilt of the defendant, and alleged that the statute of limitations had not run, and at the examination appeared for defendant and set up the statute of limitations and procured a writ of prohibition and defendant's discharge thereon, shows good ground for disbarment. *In re Stephens*, Cal. (1888).

¹³ *Bradley v. Fisher*, 13 Wall. 335; *Beene v. State*, 22 Ark. 149.

¹⁴ *Turner v. St. John*, 3 Cold. 376.

¹⁵ *In re Bowman*, 8 Cent. L. J. 250.

mitted, encouraged his hallucination, and procured money on the strength of it. *Held*, that the attorney should be disbarred: *In re Snyder*, 24 Fed. Rep. 910. Pending a writ of error in the United States supreme court in a capital case, the prisoner's attorney induced a United States commissioner to believe that he had power to issue a writ of *habeas corpus*, and admit the prisoner to bail, whereby he got away. *Held*, that the attorney should be dismissed from the bar: *State v. Burr*, 19 Neb. 593. An attorney in whose hands a note had been placed for collection agreed with the maker, without authority, that if she would board his law partner he would indorse the amount on the note. His client repudiated this agreement, and collected the full amount of the note from the maker. The attorney never accounted to his client for the amount indorsed, and never repaid it to the maker. *Held*, that this was willful professional misconduct: *In re Temple*, 33 Minn. 343.

§ 131. **Causes not Grounds for Disbarment.**—The courts have refused to disbar an attorney for the following alleged acts: extorting from a candidate for the position of receiver (as the price of consent to his appointment) that he would employ a certain person named by the attorney;¹ ignorance of the law;² disclosing information received;³ mere moral delinquencies;⁴ drawing a check on a bank in which he had no money;⁵ misconduct of a partner;⁶ neglecting to obey a subpoena;⁷ the publication over the signature of several members of the bar, of a letter in a newspaper, stating that the judge had lost the confidence of the public, and had better resign;⁸ refusing in an insulting manner to answer questions put by the judge in court;⁹ making an affidavit and representations

¹ *Ex parte Cole*, 1 McCrary, 405.

² *Bryant's Case*, 24 N. H. 149.

³ *People v. Barker*, 56 Ill. 299.

⁴ *Starr v. Vanderheyden*, 9 Johns. 253; 6 Am. Dec. 275; *In re Mills*, 1 Mich. 392; *State v. Chapman*, 1 Munf. 581; *Baker v. Commonwealth*, 10 Bush, 592.

⁵ *Bank v. Stryker*, 1 Wheel. C. C. 330.

⁶ If a claim is sent to a firm of attorneys for collection, and one collects and misappropriates the amount, the other,

having no knowledge thereof, nor even of the receipt of the claim for collection, while liable for the amount, is not liable for the statutory penalty, nor to be dismissed from the bar: *Porter v. Vance*, 14 Lea, 629.

⁷ *Commonwealth v. Newton*, 1 Grant Cas. 453.

⁸ *Case of Austin*, 5 Rawls, 191; 28 Am. Dec. 657. And see *Ex parte Cole*, 1 McCrary, 405.

⁹ *Ex parte Robinson*, 19 Wall. 505.

for the purpose of deceiving the court, where it is not clear that he intended to state a falsehood;¹ the delinquencies of a partner;² taking notes instead of money in satisfaction of a *feri facias*;³ that the grounds of a motion made by the attorney are not supported by the facts;⁴ applying abusive epithets to a judge in vacation is not a "contempt involving fraudulent or dishonorable conduct or malpractice";⁵ and the courts have refused to disbar an attorney for discreditable acts not connected with his profession,⁶ as participating in an exhibition in which pretended gifts were made to draw full houses;⁷ or attacking the court in a newspaper, not as an officer and attorney, but in the character of editor;⁸ or being guilty of fornica-

¹ *In re Houghton*, 67 Cal. 511.

² *Klingensmith v. Kepler*, 41 Ind. 341; 50 Ind. 434.

³ *Banks v. Cage*, 1 How. (Miss.) 293.

⁴ *Fletcher v. Daingerfield*, 20 Cal. 430.

⁵ *Jackson v. State*, 21 Tex. 668.

⁶ 2 Dowl. Pr. 110.

⁷ *Dickens's Case*, 67 Pa. St. 169; 5 Am. Rep. 420, the court saying: "The doctrine of *Austin's Case*, 5 Rawle, 191, 28 Am. Dec. 657, is that the power of the court may be exercised against attorneys at law, either for a contempt which is an offense against the court itself, or for unfitness which disqualifies the attorney from filling the office properly. In the present case, no contempt was committed, and the expulsion rests upon the charge of unfitness to exercise the office of an attorney. If an attorney should by a series of unprofessional acts, disgraceful to him as a man, form a character which unfits him for association with the fair and honorable men of the profession, and disqualifies him from receiving the confidence of men of integrity, bringing reproach upon himself and upon the profession to which he belongs, we will not say such unfitness, the result of habitual practices, cannot be made the subject of inquiry by the court and expulsion from the bar.

But certainly an act merely discreditable, but not infamous, such as a participation in making pretended gifts as a means of giving notoriety to an exhibition, innocent in itself, while it would lose a member of the bar the favor and countenance of the high-minded men of the profession, cannot of itself give jurisdiction to the court to take judicial cognizance of it, and expel him from his office. To admit such a power would expose the members of the bar to the whims, caprice, peculiar views, and prejudices of judges. The office of an attorney is too important to him, to those dependent on his efforts, and to the public, to be thus at the mercy of any one. The preparation of years to enable one to practice, and the prospects of a lifetime, ought not to be in the power of men, however upright, to blast, who, from peculiarity of disposition or habits of thought, may exercise the power unjustly."

⁸ *Ex parte Biggs*, 64 N. C. 204; *contra*, *Ex parte Greevy*, 4 Week. Not. Cas. 308; and see *State v. Anderson*, 40 Iowa, 207; *Ex parte Steinman*, 95 Pa. St. 220; 40 Am. Rep. 637. In *Case of Austin*, *supra*, it was said: "Even a battery might be committed by an attorney on a judge consistently with the official relation, if provoked in matters of social intercourse." In *In re Wallace*, L. R. 1 P. C. 283, an at-

tion;¹ or attempting to "fix up" a prosecution against himself not growing out of his professional position;² or for unfaithful conduct as an ordinary trustee.³ But it is otherwise as to offenses which are evidence of a criminal character in the offender.⁴ Thus an attorney has been disbarred for appropriating money collected by him, in another capacity, to his own use.⁵

torney and barrister of the supreme court of Nova Scotia addressed "a most reprehensible letter" to the chief justice, severely reflecting on the judges and their general administration of justice, on account of their disposition of certain causes in which he was a suitor. He was suspended from practice by the court, but that order was reversed by the privy council. Lord Westbury said: "This letter was a contempt of court. . . . It was an offence [which] had no connection whatever with his professional character, or anything done by him professionally. . . . If an advocate, for example, were found guilty of crime, there is no doubt that the court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. . . . When an offense was committed, which might have been adequately corrected by that punishment, and the offense was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the court as a practitioner improper, we think it was not competent to the court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se*, did not render him improper to remain as a practitioner of the court."

¹ In *re Trumbore*, 42 Am. Rep. 557 (Pa.).

² *Id.*

³ *People v. Appleton*, 105 Ill. 474; 44 Am. Rep. 812; *People v. Allison*, 68 Ill. 151.

⁴ In *State v. Winton*, 11 Or. 456, 50 Am. Rep. 486, the court said: "The question which has presented the

most difficulty, and out of which there has grown some difference of opinion, is where the facts charged against the attorney are indictable, but are in no wise connected with his professional employment, — acts done in his private but not in his professional capacity. In such cases, it has been held by some courts that where the misconduct alleged, though done in his private capacity merely, and not in his official capacity, is of such gross character as to gravely affect his standing as an attorney, they will exercise the power of removal or disbarment. This seems to be an exception to the general rule as held by other courts, which confines the exercise of such summary jurisdiction over an attorney to cases where the misconduct was committed in his professional character, or was in some way, or in some matter, so connected with his professional character as to be the direct result of it. Courts, adhering to this rule, when the misconduct alleged constitutes an indictable offense not growing out of or in any way connected with his professional employment or duties, refuse to proceed in this summary manner, but leave the party injured to obtain relief by a prosecution in the proper court, or the matter to be prosecuted by a public officer, upon whom the law devolves the duty of prosecuting criminal offenses. But there is no doubt much authority for extending the rule to misconduct for acts which are indictable and committed outside of the professional relation, when the misconduct alleged against the attorney is so gross as to seriously impugn his standing and integrity."

⁵ *Delano's Case*, 58 N. H. 5; 42 Am. Rep. 555.

ILLUSTRATIONS. — An attorney accepted a deed of trust, not as a result of his professional advice, but simply as a friendly office, and afterwards appropriated money arising from his wrongful mortgage and sale of the property to his own use. *Held*, that this was not professional misconduct justifying summary disbarment: *People v. Appleton*, 105 Ill. 474; 44 Am. Rep. 812. On January 7, 1885, the supreme court made an order, referring the settlement of a bill of exceptions to a certain judge. Subsequently, the attorneys for the parties interested, of whom the respondent was one, entered into a stipulation for the continuance of the hearing of the settlement of the bill of exceptions. Thereafter a motion was made in the supreme court to set aside the order of reference of January 7, 1885. That motion was contested by the respondent, who filed an affidavit in which he stated that it had been stipulated that the bill of exceptions should be settled by the judge. On the argument of the motion, the respondent, in reply to a suggestion that the stipulation was, or might have been, a stipulation merely to continue the hearing, replied: "No; the stipulation is as stated in the affidavit." *Held*, that the evidence did not show that the respondent intentionally made a false statement for the purpose of misleading the court, and that consequently he ought not to be disbarred: *In re Houghton*, 67 Cal. 511. Certain attorneys were notified that the deposition of a witness for whom they had sought would be taken by the adverse party. Being desirous of knowing to what he would testify, they sent an agent to see him, with instructions to try to incline him as favorably towards their client as possible. Their agent induced the witness to keep out of the way, making him drunk for the purpose, and got him to come to the city where one of the attorneys was, and have a consultation with the latter at his office. There was no evidence that the attorneys directed the witness to be made drunk or to be kept out of the way, nor that he should be bribed or intimidated. *Held*, not a sufficient ground for disbarment: *In re Thomas*, 36 Fed. Rep. 242. A candidate for the office of district judge refused an offer of money for campaign purposes made on condition that he appoint the party making it clerk of the court in case of his election, but, upon consultation with friends, who advised him that such party would do him much injury if he did not accept, executed a written promise to make such appointment, and gave it to a friend to deliver, charging him not to accept any money. The money was, however, tendered, and still acting upon the suggestion that the party had it in his power to injure him, he accepted it, but returned it after the election. *Held*, that the transaction did not warrant the disbarment of the candidate after his election: *People v. Goddard*, Col. (1888).

§ 132. **Suspension for a Time.**—Disbarment is an extreme remedy, and should not be decreed when any punishment less severe—such as a reprimand, temporary suspension, or fine—would accomplish the desired end.¹ Thus in some cases the court has adjudged it a sufficient punishment that the attorney should be suspended from practice for a time only;² e. g., for twelve months for using indecorous language to the court in a petition for rehearing, suggesting that the court was disposed to punish him for publishing certain articles;³ until he paid the costs of an action he had brought without authority;⁴ until he paid a fine of fifty dollars for addressing a letter to a judge in which he stated that an injunction issued by him “was against the law as everybody knows it”;⁵ a fine of two

¹ Bradley v. Fisher, 13 Wall. 335; Paul v. Purcell, 1 Browne, 348.

² Ex parte Burr, 9 Wheat. 529; 2 Cranch C. C. 379.

³ De Arma's Case, 10 Mart. 123.

⁴ Anonymous, 2 Cow. 590.

⁵ In re Pryor, 18 Kan. 72; 26 Am. Rep. 747. “An attorney,” said the court, “is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity. Certain privileges attach to him by reason of such official position. He may in the trial of cases use language concerning witnesses and parties, and all matters and things in issue, which elsewhere and under other circumstances would be libelous. By virtue of this privilege, we often hear from the lips of counsel in argument, or read in the briefs filed in proceedings in error in this court, the most severe animadversion and criticism upon the conduct and rulings of the courts from which the proceedings are brought. They have the same right of criticising the ruling and conduct of those courts in proceedings pending here that they have in those courts of criticising the actions and conduct under review there. In other words, the independence of the profession carries with it the right freely to challenge, criticise, and condemn

all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. And the fact that the tribunal is an inferior one, and its rulings not final and without appeal, does not diminish in the slightest degree this obligation of courtesy and respect. A justice of the peace, before whom the most trifling matter is being litigated, is entitled to receive from every attorney in the case courteous and respectful treatment. He is *pro hac vice* the representative of the law, as fully as the chief justice of the United States in the most important case pending before him. A failure to extend this courteous and respectful treatment is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. Now, as we have said, the language of the letter is insulting. It would be so regarded outside of judicial proceedings, and in the intercourse of gentlemen. To charge another with knowingly doing an illegal act would always be regarded as an imputation to be resented. Change the circumstances a little: suppose in a public trial in the courthouse, after a ruling had been made, an attorney in the case should say to the court: ‘That ruling is not the

hundred and fifty dollars for writing a letter to the trial judge, intimating that he was prejudiced against the prisoner, and had better not sit;¹ for six months, for knowingly antedating the *jurat* to an official oath, and the acknowledgment of an official bond, taken before himself as a notary public, no excuse, explanation, or justification of the false dating being offered or attempted;² for six months for having abstracted from the files a receipt attached to a *feri facias*;³ and not accounting to a client or paying the proceeds of a note collected;⁴ for one year for concealing, in moving for the admission of a person to the bar, that he had previously been rejected;⁵ for five years for receiving money for a client to apply to certain purposes, and not doing so;⁶ for three months for drawing an indictment as district attorney, and afterwards appearing for the defendant;⁷ for two years, and until the payment of a certain judgment obtained against him by a client;⁸ for five years for converting money received in a professional capacity to his own use;⁹ or the imposition of a fine, as for instituting a groundless motion to disbar

law, and your honor knows it.' Who would doubt that the court might rightly treat such language as contempt, and punish it accordingly? Yet practically that is the case. The fact that in the case supposed others are listening, and hear the words, and in this the language reaches the judge alone, does not change the quality of the act. It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed, or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integ-

rity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. Nor do we wish to be understood as expressing any opinion as to the power to punish others than attorneys and officers of the court, for language or conduct even while the matter is pending and undetermined. Whether the same rules and considerations apply to them or not, we do not care to inquire. Such is not the case before us, and to this case alone do our remarks apply."

¹ *People v. Tweed*, 26 Am. Rep. 752, note.

² *In re Arctander*, 26 Mich. 343.

³ *In re Gates*, 1 Pa. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

⁴ *In re Temple*, 33 Mich. 343.

⁵ *In re Deringer*, 12 Phila. 217.

⁶ *In re Moore*, 72 Cal. 359.

⁷ *People v. Spencer*, 61 Cal. 128.

⁸ *In re Tyler*, 71 Cal. 353.

⁹ *In re Moore*, 72 Cal. 359.

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another attorney with an improper motive, the costs were imposed on the mover.¹ Where a statute gives the court power to remove or suspend, the latter will be the judgment entered only where mitigating circumstances are shown.²

ILLUSTRATIONS.—An attorney moved that a person be admitted to the bar, against whose application the board of examiners had reported. The attorney knew this fact, but concealed it. *Held*, that he was properly suspended: *In re Deringer*, 12 Phila. 217. A, in 1874, as district attorney, drew an indictment which the grand jury returned as a true bill. In 1881 A appeared as attorney for the defendant in the indictment. *Held*, that he was thus guilty of a "violation of his duty as attorney," and properly punished—no harm, apparently having been intended—by three months' suspension from practice: *People v. Spencer*, 61 Cal. 128.

§ 133. Previous Conviction not Necessary.—It is not necessary that the attorney should have been first convicted of a criminal charge by indictment, where the misconduct took place in his official character.³ As to criminal acts of the attorney not done in his official character, there is a difference of opinion; some courts holding that there must have been a regular indictment and conviction before the court will strike his name from the roll;⁴ others that such a previous conviction is not neces-

¹ *Ex parte Kelly*, 62 N. Y. 198.

² *In re Buchanan*, 28 Mo. App. 230.

³ *Ex parte Wall*, 137 U. S. 265; *In re Peterson*, 3 Paige, 510; *Ex parte Brown*, 1 How. (Miss.) 303; *Dickens's Case*, 67 Pa. St. 169; 5 Am. Rep. 420; *Ex parte Mills*, 1 Mich. 392; *In re Hirst*, 9 Phila. 216; *Baker v. Commonwealth*, 10 Bush, 592; *Penobscot Bar v. Kimball*, 64 Me. 140; *In re Wood*, 36 Mich. 299; *People v. Goodrich*, 79 Ill. 148; *Ex parte Walls*, 64 Ind. 461; *Delano's Case*, 58 N. H. 5; 42 Am. Rep. 555; *In re Percy*, 36 N. Y. 651; *State v. Winton*, 11 Or. 456; 50 Am. Rep. 486; *In re Treadwell*, 66 Cal. 400. *Contra*, in North Carolina, *Kane*

v. Haywood, 66 N. C. 1; *Ex parte Schenck*, 65 N. C. 355. An attorney convicted of crime forfeits his rights as such without an order of the supreme court removing him: *In re Niles*, 5 Daly, 465; *In re E.*, 65 How. Pr. 171.

⁴ *State v. Chapman*, 11 Ohio, 430; *Ex parte Steinman*, 95 Pa. St. 229; *Anonymous*, 7 N. J. L. 162; *State v. Foreman*, 3 Mo. 412; *Fisher's Case*, 6 Leigh, 619; *Beene v. State*, 22 Ark. 149; *Willson v. Willson*, 5 N. J. L. 796. Pending an appeal from the judgment of a justice's court convicting an attorney of embezzlement, proceedings for his disbarment are premature: *People v. Treadwell*, 66 Cal. 400.

sary.¹ The withdrawal of a criminal charge by a client against an attorney does not prevent his disbarment for that act.²

§ 134. Practice in Disbarment Proceedings—Proof—Appeal.—The proper practice in cases of disbarment is for the court, on the charges being presented supported by affidavit, to issue a rule on the attorney to show cause why he should not be removed.³ If the offense was committed in the presence or within the personal knowledge of the court, the judge may proceed on his own motion.⁴ The state need not commence the prosecution; it is the right and duty of the bar or the court to do so.⁵ It is

¹ *Ex parte Burr*, 1 Wheel. C. C. 503; 2 Cranch C. C. 379; *Smith v. State*, 1 Yerg. 228; *Perry v. Iowa*, 3 G. Greene, 550; *In re Percy*, 36 N. Y. 651; *Penobscot v. Kimball*, 64 Me. 140; *Delano's Case*, 58 N. H. 5; 42 Am. Rep. 555; *In re Wool*, 36 Mich. 299; *People v. Appleton*, 105 Ill. 474; 44 Am. Rep. 812; *Ex parte Wall*, 107 U. S. 265; *Ex parte Walls*, 64 Ind. 461; *Watson v. Citizens' Savings Bank*, 5 S. C. 159. *In Ex parte Wall*, 107 U. S. 265, the court say: "It is apparent that whilst it may be the general rule that a previous conviction should be had before striking an attorney off the roll, for an indictable offense committed by him when not acting in his character of an attorney, yet, that the rule is not an inflexible one. Cases may occur in which such a requirement would result in allowing persons to practice as attorneys who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail, by the absence of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; and in such cases, even in England, the proceeding to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be; a prevailing popular excitement, powerful influences brought to bear on the public mind or on the

mind of the jury, and many other causes which might be suggested; and yet, all the time the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority. It seems to us that the circumstances of the case, and not any iron rule on the subject, must determine whether and when it is proper to dispense with a preliminary conviction. If, as Lord Chief Justice Cockburn said, the evidence is conflicting, and any doubt of the party's guilt exists, no court would presume to proceed summarily, but would leave the case to be determined by a jury. But where the case is clear and the denial is evasive, there is no fixed rule of law to prevent the court from exercising its authority."

² *In re Davies*, 93 Pa. St. 116; 39 Am. Rep. 729.

³ *In re Bowman*, 8 Cent. L. J. 250; *In re Percy*, 36 N. Y. 651; *Perry v. State*, 3 Iowa, 550; *State v. Holding*, 1 McCord, 379; *Baker v. Commonwealth*, 10 Bush. 502; *Ohio v. Chapman*, 11 Ohio, 430; *Ex parte Burr*, 9 Wheat. 529; *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314.

⁴ *Weeks on Attorneys*, sec. 83.

⁵ *In re Bowman*, 8 Cent. L. J. 250; *In re Percy*, 36 N. Y. 651; *alter* in Kentucky by statute: *Turner v. Commonwealth*, 2 Met. (Ky.) 619.

not necessary that proceedings against attorneys for malpractice or any unprofessional conduct should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from his own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is, that when not taken for matters occurring in open court in the presence of the judge, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted so that it be without oppression or unfairness is a matter of judicial regulation.¹ The charges should be presented by affidavit, but want of an affidavit does not render the proceeding void.² Except where the matter occurs in open court, the summary power of disbarment should not be exercised without notice to the offending attorney of the grounds of complaint, and an opportunity for explanation or defense.³ In Kentucky, if an attorney has been prosecuted by an indictment or information, and his guilt confessed or found by a jury, the courts in which he practiced have the power, upon his guilt thus appearing, to strike his name from the roll of attorneys, and thereby disable him from practicing in the court inflicting the punishment. But in a summary proceeding for malpractice the fact must be known

¹ *Randall v. Brigham*, 7 Wall. 523.

² *Ex parte Wall*, 107 U. S. 265. In Florida, a proceeding to disbar an attorney is special, of a summary character. The pleadings are not controlled by common-law rules. A replication to the answer is unnecessary. After the filing of the answer, upon counter-motions to make the rule absolute and to discharge it, testimony is admissible without further pleading: *State v. Maxwell*, 19 Fla. 31.

³ *Bradley v. Fisher*, 13 Wall. 335; *Saxton v. Stowell*, 11 Paige, 520; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Beene v. State*, 22 Ark. 149; *Ex parte Robinson*, 19 Wall. 505; *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 255; *Fletcher v. Daingerfield*, 20 Cal. 427; *Jackson v. State*, 21 Tex. 668; *Fisher's Case*, 6 Leigh, 619; *Peyton's Appeal*, 12 Kan. 405; *In re Brewster*, 12 Hun, 109; *Dickinson v. Dustin*, 21 Mich. 561; *Randall v. Brigham*, 7 Wall. 523.

to the court by having occurred in its presence.¹ Where a suit in equity against an attorney and solicitor charging him with fraud under circumstances implicating him in a gross abuse of confidence has been before the court on the facts, and the court has decreed against him, an order to show cause why he should not be struck from the rolls may properly be based on the decree, or be incorporated in the decree itself.² The charges should be definite and certain, and state with particularity the offenses alleged against the attorney.³ As such a proceeding is penal in its nature, the evidence to sustain it should be free from doubt.⁴ In Kansas, in a proceeding to disbar an attorney at law on the ground that he fraudulently procured his admission to the bar, the defendant is entitled to a change of venue or to a trial before a judge *pro tem*, if it appears that the judge then sitting is prejudiced against him.⁵ In Iowa a proceeding upon charges preferred by a private prosecutor to disbar an attorney is a special proceeding, wherein a change of venue on account of prejudice of the judge may be granted upon the same conditions and upon compliance with the same rules as in ordinary civil actions.⁶ The power to disbar is exercised with caution and discretion,⁷ and the court should be satisfied of the guilt of the attorney before disbaring or even suspending him.⁸ He is not entitled to a jury trial,⁹ except in some states where it is given by statute,¹⁰ nor, except where required by statute, need the prosecution be in the name of

¹ Walker v. Commonwealth, 8 Bush, 86. People v. Barker, 56 Ill. 299; In re Baluss, 28 Mich. 507.

² In re Wool, 36 Mich. 299.

³ People v. Allison, 68 Ill. 151; Fletcher v. Daingerfield, 20 Cal. 427; Ex parte Smith, 28 Ind. 47; Walker v. Commonwealth, 8 Bush, 86; Florida v. Kirke, 12 Fla. 278; 95 Am. Dec. 314; Reilly v. Cavanaugh, 32 Ind. 214; In re Mills, 1 Mich. 392; People v. Tryon, 4 Mich. 665.

⁴ In re Attorney, 1 Hun, 321; Fletcher v. Daingerfield, 20 Cal. 427;

⁵ Matter of Peyton, 12 Kan. 398.

⁶ State v. Clark, 46 Iowa, 155.

⁷ Rice v. Commonwealth, 13 B. Mon. 472; Ex parte Robinson, 19 Wall. 505.

⁸ In re Houghton, 67 Cal. 511; In re Lowenthal, 66 Cal. 122; People v. Barker, 56 Ill. 299; In re —, 1 Hun, 321.

⁹ Smith v. State, 1 Yerg. 228.

¹⁰ Reilly v. Cavanaugh, 32 Ind. 214; In re Bowman, 8 Cent. L. J. 250.

the state.¹ The judgment should specify the particular charge or charges on which he is found guilty.² It cannot adjudge the attorney "infamous."³ The court has a discretion in the matter which will not, except for great injustice, be reversed on appeal.⁴ In most states, however, an appeal lies.⁵ An appeal in such a case does not restore the attorney to the right to practice pending its determination.⁶ The law does not favor informations against attorneys at law after a lapse of a great length of time from the commission of the acts complained of. In analogy to the limitation of prosecutions for misdemeanors, there ought to be a limit to the time for filing such informations.⁷

§ 135. **Mandamus to Restore Attorney.**—Where the court has exceeded its jurisdiction in disbarring an attorney, *mandamus* is the proper remedy to restore him.⁸

§ 136. **Readmission after Disbarment.**—An attorney may be readmitted after being disbarred,⁹ but a pardon

¹ In re Bowman, 8 Cent. L. J. 250.

² Perry v. State, 3 G. Greene, 550; State v. Watkins, 3 Mo. 388.

³ Fletcher v. Daingerfield, 20 Cal. 430.

⁴ Ex parte Secombe, 19 How. 9; Ex parte Burr, 9 Wheat. 529; In re Davies, 93 Pa. St. 116; 39 Am. Rep. 729; Rice v. Commonwealth, 18 B. Mon. 472; Commonwealth v. Judges, 5 Watts & S. 272; State v. Tunstall, 51 Tex. 81.

⁵ Winkelman v. People, 50 Ill. 449; Turner v. Commonwealth, 2 Met. (Ky.) 619; In re Bowman, 8 Cent. L. J. 250; Commonwealth v. McLaughlin, 5 Watts & S. 272; State v. Start, 7 Iowa, 499; 74 Am. Dec. 278; Rice v. Commonwealth, 18 B. Mon. 472; Dillon v. State, 6 Tex. 55; Jackson v. State, 21 Tex. 668; Ex parte Smith, 28 Ind. 47; Ex parte Trippe, 66 Ind. 531.

In Michigan the appellate court will not refuse to review a decision of the court below disbarring an attorney, upon the facts and merits, as well as upon questions of power, regularity, etc., though they will not reverse on the evidence unless a plain case is

shown: Matter of Wool, 36 Mich. 299. Where the attorney is disbarred by the supreme court, a motion for a new trial is not a proper proceeding for a rehearing: In re Tyler, 71 Cal. 353.

⁶ Walls v. Palmer, 64 Ind. 493.

⁷ People v. Allison, 68 Ill. 151.

⁸ Ex parte Robinson, 19 Wall. 505; People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; Ex parte Garland, 4 Wall. 378; Fletcher v. Daingerfield, 20 Cal. 430; Withers v. State, 36 Ala. 252; Ex parte Bradley, 7 Wall. 354; Ex parte Burr, 9 Wheat. 530; Ex parte Heyfron, 7 How. (Miss.) 127; Rice v. Commonwealth, 18 B. Mon. 472; State v. Start, 7 Iowa, 499; 74 Am. Dec. 278; People v. Justices, 1 Johns. Cas. 182; State v. Kirke, 12 Fla. 278; 95 Am. Dec. 314. As to when *mandamus* will not lie though proceedings were irregular, see Ex parte Randall, 11 Allen, 473. It is held in some states that *mandamus* will not lie to compel the admissions of an attorney: Commonwealth v. Judges, 1 Serg. & R. 187.

⁹ Rex v. Greenwood, 1 W. Black. 222; Ex parte Frost, 1 Chit. 558, note.

granted for the crime for which he was disbarred does not restore his office of attorney.¹ Under the Indiana statute, when an attorney who has been disbarred applies for readmission, it is within the power of the court to secure a petition against his readmission, and to appoint certain of the petitioners to resist his application.² Where an attorney is disbarred for misappropriating his client's money, if he seeks to be readmitted it will be a condition precedent that he make all the restitution in his power.³

¹ In re Attorney, 86 N. Y. 563;
Penobscot Bar v. Kimball, 64 Me. 140.

² Ex parte Walls, 73 Ind. 95.
³ In re Poole, L. R. 4 Com. P. 350.

CHAPTER XIV.

PRIVILEGES, DISABILITIES, AND LIABILITIES OF ATTORNEYS
TO THIRD PERSONS.

- § 137. Privileges and exemptions of attorneys.
- § 138. Exemption from arrest.
- § 139. Privilege of suing.
- § 140. Exemption from civil duties.
- § 141. Exemption from responsibility for words spoken.
- § 142. Disabilities of attorneys.
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- § 145. To purchase demands for suit.
- § 146. Communications between attorney and client.
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- § 148. To become surety for client.
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- § 150. Liability to third persons.
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- § 153. Liability for costs and fees.
- § 154. Liability for trespass.
- § 155. Liability for malicious prosecution.

§ 137. **Privileges and Exemptions of Attorneys.** — From an early day the office of attorney has had attached to it certain privileges and exemptions which have been granted, "not for the sake of the individual, but of the suitors, and of the administration of justice."¹ They are: 1. A privilege from arrest; 2. A privilege in suing and being sued; 3. An exemption from civil duties; 4. An exemption from liability for words spoken in argument.²

§ 138. **Exemption from Arrest.** — He is privileged from arrest in civil suits,³ but only while in necessary

¹ In re Bliss, 9 Johns. 347. Therefore he cannot waive them: Scott v. Van Alstyne, 9 Johns. 216.

² An attorney has likewise a right at all times to visit his client in person: Ex parte McClellan, 1 Wheel. C. C. 303.

³ Emmet's Case, 2 Caines, 387; Og-

don v. Hughes, 5 N. J. L. 718; Gibbs v. Loomis, 10 Johns. 463; Secor v. Bell, 18 Johns. 55; Corey v. Russell, 4 Wend. 204; Commonwealth v. Ronald, 4 Call, 97; Sperry v. Willard, 1 Wend. 32; Humphrey v. Cumming, 5 Wend. 90; Bohanan v. Peterson, 9 Wend. 503.

attendance on the court,¹ and while he is practicing his profession,² and not when sued jointly with others.³

§ 139. Privilege of Suing.—There was an ancient privilege of attorneys in England of suing or being sued in the court in which they were enrolled. This privilege never had much footing in our courts, and is certainly now obsolete.⁴

§ 140. Exemption from Civil Duties.—An attorney is exempt from serving as a juror,⁵ or as overseer of the poor, or supervisor of public roads;⁶ but he is not exempt from military duty, which is a great national service to which all men are equally liable.⁷

§ 141. Exemption from Responsibility for Words Spoken.—Words spoken by an advocate in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry.⁸ The reasons for this exception

¹ *Gibbs v. Loomis*, 10 Johns. 463; *Corey v. Russell*, 4 Wend. 204; *Cole v. McLellan*, 4 Hill, 59; *Foster v. Garnsey*, 13 Johns. 465.

² *Brooks v. Patterson*, 2 Johns. Cas. 102; *Colt v. Gregory*, 3 Cow. 22.

³ *Tiffany v. Driggs*, 13 Johns. 252.

⁴ See *Allare v. Ouland*, 2 Johns. Cas. 52; *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 158; 35 Am. Dec. 528; *King v. Burr*, 20 Johns. 274.

⁵ In *re Swett*, 20 Pick. 1. Even though he may not be in active practice, or may have retired. The test is, Has he a right to practice if he desires to?

⁶ *R. v. Fisher*, 1 Yeates, 350.

⁷ *R. v. Fisher*, 1 Yeates, 350; In *re Bliss*, 9 Johns. 347.

⁸ *Hoar v. Wood*, 3 Met. 193; *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418; *Stackpole v. Hennen*, 6 Mart., N. S., 481; 17 Am. Dec. 187;

Commonwealth v. Culver, 1 Pa. L. J. 361. As early as the reign of James I., it was laid down in England "that a counselor hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false": *Brook v. Montague*, Cro. Jac. 90. Later, in *Wood v. Gunston*, Styles, 462, decided in 1655, it is said that "if a counsel speak scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." *Buller, J.*, in *Weatherston v. Hawkins*, 1 Term Rep. 110, says: "In actions of this kind, unless he can prove the words to be malicious, as well as false, they are not actionable"; and Lord Mansfield, in *Edmonson v. Stephenson*,

to the general rules of the law of slander are these: the counsel for a person is the legal substitute for the party himself; so far as respects the subject before the court, he is presumed to be invested with the whole person and case of his client. Whatever, therefore, law or reason would allow to a man pleading his own cause, whether in statement or in the expression of natural feelings, belongs, to the same extent, to the counsel who represents him.¹ A defamatory statement contained in the declaration in an action signed by counsel, if not pertinent or material to the issue, is not privileged; and in an action of libel against the counsel, he cannot justify by showing

Bull. N. P. 8: "The gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved. But if without ground, and purely to defame, an action would lie": *Hargrave v. Le Breton*, 4 Burr. 2422; *Rogers v. Clifton*, 3 Bos. & P. 587. The case of *Hodgson v. Scarlett*, 1 Barn. & Ald. 233, is the leading English case on this subject. The defendant, one of the leaders of the bar, and afterwards known as chief baron of the court of exchequer, under the name of Lord Abinger, was sued for having used the following words while acting as counsel in the trial of a cause: "Some actions are founded in folly, some in knavery, some in both, some in folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves. Hodgson was the attorney of the parties, drew the promissory note, fraudulently got Bowman to pay into his hands 150 pounds for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney." The court unanimously agreed that the action would not lie. *Ellenborough, C. J.*: "A counsel intrusted with the interests of others, and speaking from their information, for the sake of public convenience, is privileged in commenting fairly and *bona fide* on the circumstances of the case, and in making observations on the parties concerned, and their instruments or

agents in bringing the case into court. The defendant says that he is a fraudulent and wicked attorney. These were words not used at random and unnecessary, but were a comment upon the plaintiff's conduct as attorney. Perhaps they were too strong; it may have been too much to say that he was guilty of fraud as between man and man, and of wickedness *in foro divino*. The expression in the exercise of a candor fit to be adopted might have been spared. But still a counsel might *bona fide* think such an expression justifiable under the circumstances. It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable." *Abbott, J.*: "They were spoken in a course of judicial inquiry, and were relevant to the matter in issue. I am therefore of opinion that no action can be maintained, unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable. It would be impossible that justice could be well administered if counsel were to be questioned for the too great strength of their expressions; here the words were pertinent, and there is no pretense for saying that the defendant maliciously availed himself of his situation to utter them." And see *Lewis v. Higgins*, 62 L. T. 98.

¹ See article, "The privilege of an advocate," 4 Cent. L. J. 76.

his belief that it was true, the sources of his information, or his instructions.¹ This privilege extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, and ecclesiastical bodies,² subject, however, to the restriction that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation.³ It is immaterial if the words are uttered in the course of a trial, whether in form they are addressed to the witness or to the court or jury. The remarks addressed to a witness in the form of putting a question reminding him of his duty or recurring to what he had before stated, indicating a contradiction in different parts of his testimony or calling upon him to show how he can reconcile them, though in form directed to the witness, are made in the hearing of the court or magistrate, and may constitute a part of that comment upon the evidence which has a bearing on the result.⁴ The privilege, however, is subject to the limit that a counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Words charging a witness with perjury uttered by a party or his counsel in the course of a trial may or may not be actionable, according as they were or were not spoken maliciously, were or were not pertinent to the issue, as there was or was not color for making the imputation, or as they were or were not spoken with a design to slander the witness.⁵ And a defamatory state-

¹ McLaughlin v. Cowley, 131 Mass. 70.

² Hoar v. Wood, 3 Met. 193; York v. Pease, 2 Gray, 282; Farnsworth v. Storrs, 5 Cush. 417; Holt v. Parsons, 23 Tex. 9; 76 Am. Dec. 49.

³ Hosmer v. Loveland, 19 Barb. 111; Howard v. Thompson, 21 Wend. 319; 34 Am. Dec. 238; O'Donoghue v.

McGovern, 23 Wend. 26; Hastings v. Lusk, 22 Wend. 410; 34 Am. Dec. 330; Fawcett v. Charles, 13 Wend. 473; Milam v. Burnside, 1 Brev. 295.

⁴ Shaw, C. J., in Hoar v. Wood, 3 Met. 193.

⁵ Ring v. Wheeler, 7 Cow. 725; Burlingame v. Burlingame, 8 Cow. 141; Hastings v. Lusk, 22 Wend. 410; 34

Am.
Vt.
v. B.
Gill
Dec.
Am.
624;
316;
v. C.
Pike
Broo
wale
Blar
214;
Am.
N. Y.
Slau
Shel

ment contained in a pleading filed in a cause to be privileged must be pertinent and material to the issue.¹ The privilege is a personal one, the subsequent publication of a speech made by counsel in a cause, containing libelous matter, being unlawful because it extends beyond what is required for the administration of justice.²

§ 142. **Disabilities of Attorneys.**—But there are disabilities as well as privileges attaching to the office of attorney, as will be seen from the succeeding sections. Thus an attorney is bound, if ordered by the court, to defend a destitute person without charge,³ and can make no claim for his compensation on the public.⁴

§ 143. **To Act in Diverse Capacities.**—A solicitor in a cause has been held disabled from acting as a special master to execute the decree;⁵ an attorney from acting as administrator of an estate, and at the same time as attorney to collect a debt of the intestate;⁶ a constable *de facto* from acting as attorney in the case whose summons he served;⁷ an attorney for the plaintiff from issuing a writ as justice.⁸ Counsel who represent private interests cannot be retained to assist in criminal prosecutions growing

Am. Dec. 330; *Mower v. Watson*, 11 Vt. 536; 34 Am. Dec. 704; *McMillan v. Birch*, 1 Binn. 178; 2 Am. Dec. 426; *Gilbert v. People*, 1 Denio, 41; 43 Am. Dec. 646; *Coffin v. Coffin*, 4 Mass. 1; 3 Am. Dec. 189; *Wyatt v. Buell*, 47 Cal. 624; *Gray v. Pentland*, 2 Serg. & R. 23.

¹ *McLaughlin v. Cowley*, 127 Mass. 316; 131 Mass. 70.

² *Rex v. Abington*, 1 Esp. 226; *Rex v. Creevey*, 1 Maule & S. 273; *Flint v. Pike*, 6 Dowl. & R. 528; *Elsall v. Brooks*, 17 Abb. Pr. 221; *R. v. Oswald*, 1 Dall. 319; *Commonwealth v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Sanford v. Bennett*, 24 N. Y. 20. And see *post*, Division 2, Slander and Libel.

³ *People v. Supervisors of Erie*, 1 Sheld. 517; *Vise v. Hamilton Co.*,

19 Ill. 78; *Bacon v. Wayne Co.*, 1 Mich. 461; *House v. Whitis*, 5 Baxt. 690. But see *Carpenter v. Dano Co.*, 9 Wis. 277; *Webb v. Baird*, 6 Ind. 13; *Hall v. Washington Co.*, 2 G. Greene, 473.

⁴ *Dismukes v. Supervisors*, 58 Miss. 612; 38 Am. Rep. 339; *Wayne Co. v. Waller*, 90 Pa. St. 99; 35 Am. Rep. 636; *Lamont v. Solano Co.*, 49 Cal. 158; *Rowe v. Yuba Co.*, 17 Cal. 61; *Elam v. Johnson*, 48 Ga. 348; *Arkansas Co. v. Freeman*, 31 Ark. 266; *People v. Supervisors*, 78 N. Y. 622; *Case v. Commissioners*, 4 Kan. 441; 96 Am. Dec. 190. And see chap. 17.

⁵ *White v. Huffmaker*, 27 Ill. 349.

⁶ *Spinks v. Davis*, 32 Miss. 152.

⁷ *Wilkinson v. Vorce*, 41 Barb. 370;

Knight v. O'lell, 18 How. Pr. 279.

⁸ *Ingraham v. Leland*, 19 Vt. 304.

out of such interests.¹ Where an attorney receives a large sum of money from his client as payment for services to be rendered to her in and about the settlement of the estate of her deceased husband, he is bound at all times to hold himself in readiness to render them, disembarassed from all complication with others, and to take no position against her, and not to appear as attorney and counsel for parties litigating with her, in relation to her rights or claims under the will, upon the estate of her husband.² The fact that an attorney for clients having different interests is enjoined for one does not restrain his professional action for others.³ An attorney may act as commissioner to take a deposition in the cause.⁴ The attorney for the mortgagee in a foreclosure suit may properly appear also as attorney for a purchaser of the equity of redemption.⁵ One who acts as counsel for a corporation does not commit a breach of trust if he afterwards acts as counsel in a proceeding against a director to recover money which the corporation has lost through a breach of the director's official trust.⁶ A commissioner to examine and allow claims against an insolvent savings bank is not disqualified from acting as attorney for the assignee.⁷ The fact that an attorney is employed as an agent to negotiate loans does not preclude him from rendering professional services to his principal.⁸

¹ *People v. Hurst*, 41 Mich. 328.

² *Quinn v. Van Pelt*, 36 N. Y. Sup. Ct. 279.

³ *Slater v. Merritt*, 75 N. Y. 268.

⁴ *Taylor v. Branch Bank*, 14 Ala. 633.

⁵ *Wallace v. Furber*, 62 Ind. 103.

⁶ *Bent v. Priest*, 10 Mo. App. 543.

⁷ *Hall v. Brackett*, 60 N. H. 215.

⁸ *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63. In a note to *Flaacke v. Jersey City*, 33 N. J. Eq. 60, Mr. Stewart in his excellent way has collected the following decisions: the mayor of a city has been held competent to act as its attorney: *Niles v. Muzzy*, 33 Mich. 61; 20 Am.

Dec. 670. See *Gibson v. Zanesville*, 31 Ohio St. 184; *Powers v. Decatur*, 54 Ala. 214. But in *Vin. Abr.*, Attorney, K, it is said that, in an action by the commonalty of a town, one of the commonalty cannot appear as attorney for the commonalty, for he is party to the action. A statute prohibiting a director of a bank to appear as its attorney was deemed constitutional: *West Feliciana R. R. Co. v. Johnson*, 5 How. (Miss.) 273. So brokers who were also attorneys were held not entitled to charge counsel fees for services about the business of their employer in relation to lands in their hands as such brokers: *Walker v.*

ILLUSTRATIONS.—A lawyer was employed to and did perform certain services for a railroad company in which he was a stockholder, in procuring the release of a mortgage upon its property, the surrender of certain of its bonds, the release of its liability on a contract, and the extension of a land grant, and in taking care of the surrendered bonds, etc. *Held*, that the fact that he was a stockholder did not preclude him from sustaining the relation of attorney to the railroad company, being retained and recovering for the services in question: *Barker v. Cairo etc. R. R. Co.*, 3 *Thomp. & C.* 329.

§ 144. To Act for Both Parties, or on Both Sides.—

An attorney cannot serve professionally both parties to a suit.¹ An attorney will not be permitted to represent both parties to a controversy, a county, for instance, and the commissioners against whom, at the county's instance, a writ of mandate is asked.² But the fact that a contract is drawn up by and under the advice of one who is the counsel for both parties does not invalidate it in the absence of fraud, and where the relation of the attor-

American Nat. Bank, 49 N. Y. 659; *Dyer v. Sutherland*, 75 Ill. 583; nor can a receiver act as his own counsel so as to charge the estate for his services: *Bank of Niagara Case*, 6 Paige, 213; *McGourkey v. Downs*, MS., N. J. Eq., May term, 1880; see *Adams v. Woods*, 8 Cal. 321; 68 Am. Dec. 313; nor can one member of a partnership who is an attorney charge the others for professional services about the firm's affairs, either before or after dissolution: *Milburn v. Codd*, 7 Barn. & C. 419; *Van Duzer v. McMillan*, 37 Ga. 299; *McCrary v. Rudnick*, 33 Iowa, 521; nor can an attorney who is a mortgagee recover his costs on his own foreclosure: *Sclater v. Cottam*, 3 Jur., N. S., 630; *Patterson v. Donner*, 48 Cal. 369; nor can a solicitor who has an interest in attending to a cause charge for his services without an express agreement: *Martin v. Campbell*, 11 Rich. Eq. 205; see *Deire v. Robinson*, 7 Hare, 283; but he would be liable for costs: *Voorhees v. McCartney*, 51 N. Y. 387; *Commonwealth v. Donaldson*, 47 Pa. St. 363; a director of a corporation who brought suit as an attorney against such cor-

poration was held entitled to costs: *Christie v. Sawyer*, 44 N. H. 298; as to a stockholder sustaining such relation, see *Spence v. Whitaker*, 3 Port. 297.

¹ *Sherwood v. Saratoga R. R. Co.*, 15 Barb. 650; *Herrick v. Catley*, 30 How. Pr. 208; 1 *Daly*, 512; *Price v. Grand Rapids R. R. Co.*, 18 Ind. 137; *Branch v. Harrington*, 49 How. Pr. 196; *Warren v. Sprague*, 4 Edw. Ch. 416; *Valentine v. Stewart*, 15 Cal. 387; *De Celis v. Brunson*, 53 Cal. 372. An attorney representing one party in a negotiation will not be allowed to receive compensation from the other party: *De Celis v. Brunson*, 53 Cal. 372; *Orr v. Tanner*, 12 R. I. 94. The rule precluding an attorney from recovering for legal services rendered by him, both to the plaintiff and defendant in a suit, was applied in one's action on a note given him by a husband for services to both parties to a divorce suit; the payee, while attorney for the wife, having at his request persuaded her to dismiss the action: *Macdonald v. Wagner*, 5 Mo. App. 56.

² *Clarke County v. Clarke County Commissioners*, 1 Wash. Ter. 250.

ney was known to both.¹ And where the attorney to collect a note was appointed by the defendant his attorney to confess judgment on it, he having full knowledge of the attorney's position, it was held not illegal.² So an attorney after once acting as such in a suit cannot abandon his client's case and go over to the other side.³ He cannot make use of the information he has gained as such, for the benefit of the opposite party, but if in the course of other business he has become acquainted with the secrets of another, he will not thereby be prevented from acting against him.⁴ The solicitor who files a bill for the appointment of a receiver ought not to act as solicitor for the receiver; but if the defendant appears by the same solicitor in the suit by the receiver, as he did in

¹ *Joslin v. Cowee*, 50 N. Y. 626.

² *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245. The court said: "As a general rule, it is true that agents cannot act so as to bind their principals, where they have or represent interests adverse to the principals'. This rule is founded upon the consideration that the principal bargains for the skill and vigilant attention of the agent to the subject-matter intrusted to him; and the policy of the law will not tolerate the existence of an adverse interest in the agent to that of his principal, for fear it may influence his conduct to the prejudice of interests of the principal. This well-recognized rule is particularly applicable to buying and selling agents, where the principal contracts for the services of an agent at a time when he has no interest in the subject intrusted to him, but subsequently, by his own act, acquires interest in it adverse to that of the principal. In the case before us, the attorney had no interest in the matter of his agency unless it should arise from his claim to compensation as a collector, which may or may not have been otherwise settled; nor had the plaintiff any interest whatever in the act to be done of which the principal, at the time he instituted him agent, was not fully advised; and if such disqualification existed, he, by his own act, expressly

waived it by conferring upon the agent such power, with a knowledge of the facts. When it is remembered that the whole ground upon which this rule is based rests upon the fraudulent advantage which such an interest may stimulate the agent to take to the prejudice of his principal's rights, it will scarcely be contended that the circumstances of this case bring it within the reason and spirit of the rule. The principal was informed of the nature and extent of the interest which the payee in the note had in the act to be performed by the agent. The facts disclosed in the instrument itself prove this; and that it was intended that the act to be performed should inure to the mutual benefit of both the payor and payee: to the first, by saving him the expense incident to a suit in the usual form; to the other, by facilitating and making certain a recovery." How far an attorney authorized by a defendant's warrant to confess judgment may act for the plaintiff, see *Sipes v. Whitney*, 30 Ohio St. 69.

³ *Valentine v. Stewart*, 15 Cal. 387; *Commonwealth v. Gibbs*, 4 Gray, 146; *Gaulden v. State*, 11 Ga. 47; *Hatch v. Fogerty*, 10 Abb. Pr., N. S., 147; 40 How. Pr. 492.

⁴ *Price v. Grand Rapids R. R. Co.*, 18 Ind. 137.

the original suit, such appearance amounts to a waiver of all objections.¹ An attorney employed to attend to certain specified litigation, "and to all other litigations," concerning certain lands, under a contract, who accepts and prosecutes an action for another party whose interests are adverse to those of his employer, concerning the same land, if discharged by the latter, is not entitled to a specific performance of his contract with him.² But the fact that plaintiff's attorney officially, as an officer of the government, at a former time held a different view of the law of the case from that afterwards advocated by him as such attorney, need not of itself disqualify him from accepting plaintiff's retainer, or affect his right to compensation for services rendered to plaintiff.³ The trial court has power, and it is its duty, when satisfied that on a former trial the attorney has acted for one party, to prohibit him from acting on the second trial for an opposite party.⁴

ILLUSTRATIONS.—Defendant in a prosecution filed an affidavit that he had engaged one F., a lawyer, to defend him, that he had disclosed to him the facts of his case, and his evidence, etc. F. filed an affidavit admitting the retainer, but denying that he had learned anything from defendant as to his grounds or means of defense. *Held*, that F. should not be allowed to assist in the prosecution, as it would be a defeating of the ends of justice: *Wilson v. State*, 16 Ind. 392.

§ 145. To Purchase Demands for Suit.—An attorney is not at liberty to buy the matters in suit or choses in action,⁵ and this in New York has been declared a crime;⁶ and while the relation of attorney and client continues, or even after it has been dissolved, purchases made by the attorney will be regarded by the court with suspicion, and

¹ *Warren v. Prague*, 4 Edw. Ch. 416.

² *McArthur v. Fry*, 10 Kan. 233.

³ *Smith v. Chicago and Northwest-
ern R'y Co.*, 60 Iowa, 515.

⁴ *Weidekind v. Water Co.*, 74 Cal.
386; *State v. Halstead*, 63 Iowa, 376.

⁵ *Weeks on Attorneys*, sec. 121;

Cunningham v. Jones, 37 Kan. 177.

⁶ See *Van Rensselaer v. Sheriff*, 1
Cow. 443; *Baldwin v. Latson*, 2 Barb.
Ch. 306; *Mann v. Fairchild*, 14 Barb.
548.

the attorney, if there be any circumstances of fraud or inadequacy of price, will be held a trustee for the client of the property so purchased.¹

ILLUSTRATIONS.—An attorney bought a right of action from a receiver, for the benefit of his client; but the latter objected to accept the purchase, and the attorney retained the chose in action himself, and paid for it with his own money, with intent to sue upon it. *Held*, that this purchase, although at a receiver's sale, and originally in the name of another person, was a violation of 2 N. Y. Rev. Stats. 288, sec. 71, which forbids attorneys to buy things in action for the purpose of suing thereon: *Mann v. Fairchild*, 3 Abb. App. 152.

§ 146. Communications between Attorney and Client.

—An attorney, counsel, or solicitor will not be permitted, and cannot be compelled, to disclose communications, either oral or written, made to him in his professional capacity.² This privilege extends to oral communications or letters, or knowledge gained from books or papers, shown to him or placed in his hands by the client.³ “An attorney or counselor cannot, without the consent of his client, be compelled to disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance and advice. In the complicated affairs and relations of life, the counsel and assistance of those learned in the law often

¹ See *post*, Division 3, Trustees.

² *Landsberger v. Gorham*, 5 Cal. 455; *Mitchell v. Bromberger*, 2 Nev. 345; 90 Am. Dec. 550; *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114; *Riggs v. Denniston*, 3 Johns. Cas. 198; 2 Am. Dec. 145; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *Rochester etc. Bank v. Suydam*, 5 How. Pr. 254; *Rhoades v. Selin*, 4 Wash. 718; *Heister v. Davis*, 3 Yeates, 4; *Yordan v. Hess*, 13 Johns. 492; *Chirac v. Reinicker*, 11 Wheat. 280; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; *Rogers v. Dare*, Wright,

136; *Crawford v. McKissack*, 1 Port. 433; *Riley v. Johnston*, 13 Ga. 260; *Jenkinson v. State*, 5 Blackf. 465; *Holmes v. Barbin*, 15 La. Ann. 553; *King v. Barrett*, 11 Ohio St. 261; *Chew v. Farmers' Bank*, 2 Md. Ch. 231; *March v. Ludlum*, 3 Sand. Ch. 35; *Childs v. Delaney*, 1 Thomp. & C. 506; *Pearsall v. Elmer*, 5 Redf. 181.

³ *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117; *People v. Benjamin*, 9 How. Pr. 419; *Anonymous*, 8 Mass. 370; *Lynde v. Judd*, 3 Day, 499; *Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Burtis*, 14 Johns. 391; *Wilson v. Troup*, 7 Johns. Ch. 25; *Neal v. Patten*, 47 Ga. 73; *Dover v. Harrell*, 58 Ga. 572; *Fire Ass'n v. Fleming*, 78 Ga. 738.

becomes necessary, and to obtain it men are frequently forced to make disclosures which their welfare and sometimes their lives make it necessary to be kept secret. Hence, for the benefit and protection of the client, the law places the seal of secrecy upon all communications made to the attorney in the course of his professional employment, and the courts are expressly prohibited from examining him as a witness upon any facts which may have come to his knowledge through the medium of such employment."¹ To entitle the communication to

¹ *Mitchell v. Bromberger*, 2 Nev. 345; 90 Am. Dec. 550. Where a client has placed in his attorney's hands a lease, the latter cannot be compelled to produce it in evidence against the client in a criminal prosecution: *Commonwealth v. Moyer*, 15 Phila. 397. But the production of documents in the hands of counsel can be resisted only when a controversy exists, or is anticipated between parties, in relation to the subject on which communications were made to counsel, on the documents intrusted to him. It is not enough that they were made or delivered in the general course of professional business: *Park v. Williams*, 13 Abb. Pr. 63. The privilege does not extend to a combination between them to prevent the court from compelling the production of important papers at the trial: *People v. Sheriff of New York*, 29 Barb. 622; 7 Abb. Pr. 96. A bill in chancery, sworn to by a party, but never filed, and which is prepared by his attorney on the client's statement of the facts, is to be regarded as a privileged communication in the hands of the attorney: *Burnham v. Roberts*, 70 Ill. 19. The correspondence between a district attorney, representing the United States, and the attorney-general, is confidential in its nature and cannot be cited by third persons: *United States v. Six Lots of Ground*, 1 Woods, 234. In an action for falsely and maliciously representing to the treasury department of the United States that the plaintiff was intending to defraud the revenue, the plaintiff filed interrogatories requiring the de-

fendant to answer whether he did not inform the department that he knew or believed that the plaintiff was intending to commit a fraud upon the revenue. It was held that any communications of the kind to the department were privileged in the sense that their disclosure will not be compelled or permitted without the assent of the government, and that defendant would not be compelled to answer the interrogatories: *Worthington v. Scribner*, 109 Mass. 487; 12 Am. Rep. 733. By statute in some states, a physician is forbidden to disclose any information received from a patient in his professional capacity: See *Edlington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Edlington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Dilleber v. Home Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182; *Grattan v. Metropolitan Ins. Co.*, 92 N. Y. 274; 44 Am. Rep. 372; *Scuffs v. Foster*, 41 Mich. 742; *Fraser v. Jennison*, 42 Mich. 225; note to *Campau v. North*, 39 Mich. 606, in 33 Am. Rep. 433, 435. The inhibition is not confined to communications made by the patient to the physician, but protects with the veil of privilege whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose: *Briggs v. Briggs*, 20 Mich. 34. "The statute covers information acquired by observation while in attendance upon his patient, as well as communications made by the patient to him; but the rule it establishes is one of privilege for the protection of the pa-

the privilege, it is not necessary that it should have been made under any special injunction of secrecy, or that the client should have understood the extent of the privilege.¹ The communication cannot be revealed, even after the termination of the suit or proceeding in which it was made,² or after the relation of attorney and client has terminated³ with the leave of the court,⁴ or after the death of the client.⁵ Where an attorney acts for two clients, his communications with them are not privileged in a subsequent suit between their representatives,⁶ and conversations between a prosecuting witness and an attorney voluntarily assisting the state's attorney are not privileged in a subsequent action against such witness for malicious prosecution.⁷ An attorney who drew a will may testify, on its probate, to what transpired between the testator and himself in the process of its preparation and publication.⁸ And where he accepts a retainer to oppose its probate, he cannot claim exemption from testifying as to the preparation of the will, on the ground of his attorney's privilege.⁹ He may testify to communications received in the course of his professional employment, when he is called to testify by the executor, who alone could object; that parties contesting the will object to his testifying is irrelevant.¹⁰

tient; and he may waive it if he sees fit, and what he may do in his lifetime those who represent him after his death may also do for the protection of the interests they claim under him"; *Fraser v. Jennison*, 42 Mich. 225. The burden is on the party seeking to exclude the testimony to show not only that it was acquired by the physician in attending the patient in a professional capacity, but that it was necessary to enable him to act in that capacity; *People v. Schuyler*, 106 N. Y. 298.

¹ *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599.

² *Chase's Case*, 1 Bland Ch. 206; 17 Am. Dec. 277.

³ *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415.

⁴ *Andrews v. Thompson*, 1 Houst. 522.

⁵ *Bennett's Estate*, 13 Phila. 331. The privilege ceases with the client's death when the solicitor is made his executor and residuary legatee; *Crosby v. Berger*, 4 Edw. Ch. 254.

⁶ *Sherman v. Scott*, 27 Hun, 331.

⁷ *Meysenberg v. Engelke*, 18 Mo. App. 346.

⁸ *In re Austin*, 42 Hun, 516.

⁹ *Sheridan v. Houghton*, 6 Abb. N. C. 234; 16 Hun, 628.

¹⁰ *Whelpley v. Loder*, 1 Demarest, 368.

The rule of privilege is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment.¹ It is not limited to advice given or opinions stated; it extends to facts communicated by the client, to all that passes between client and attorney, in the course and for the purpose of the business.² But the privilege is confined to such communications as are made in strictly professional intercourse.³ An attorney may be required to disclose any information, pertinent to the cause, which has no necessary connection with his professional character, and which he did not acquire by reason of the confidence reposed in him, on account of that character, or to matters which did not relate to the subject-matter of the communication.⁴ Nor can the client be compelled to testify as to communications made by him to his attorney.⁵ But if he makes himself a witness, he may be cross-examined, and cannot refuse to answer on the ground of the matter being a communication which he had made to his attorney.⁶

¹ *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Britton v. Lorenz*, 45 N. Y. 57; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Beitz-hoover v. Blackstock*, 3 Watts, 20; 27 Am. Dec. 330; *Moore v. Bray*, 10 Pa. St. 524; *Clark v. Richards*, 3 E. D. Smith, 95; *Graham v. People*, 63 Barb. 482; *March v. Ludlum*, 3 Sand. Ch. 46; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 407; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; *Bigler v. Reyber*, 43 Ind. 112; *Caines v. Platt*, 15 Abb. Pr., N. S., 337. Some cases hold that the communication, to be privileged, must have relation to some suit or other judicial proceeding, either existing or contemplated: *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385; *In re O'Donohue*, 3 Nat. Bank. Reg. 245; *Riggs v. Denniston*, 3 Johns.

Cas. 198; 2 Am. Dec. 145. A sheriff is entitled to the same privilege, in his communications with his attorney, as other persons: *Paxton v. Steckel*, 2 Pa. St. 93.

² *Lengsfeld v. Richardson*, 52 Miss. 443; *Kant v. Kessler*, 114 Pa. St. 603.

³ *Cranger v. Warrington*, 8 Ill. 299; *Piercen v. Steertz*, 1 Morris, 136; *Milan v. State*, 54 Ark. 346; *Riggs v. Denniston*, 3 Johns. Cas. 198; 2 Am. Dec. 145; *Rochester City Bank v. Suydam*, 5 How. Pr. 264; *Romberg v. Hughes*, 18 Neb. 579.

⁴ *Chew v. Farmers' Bank of Maryland*, 2 Md. Ch. 231; *Beeson v. Beeson*, 9 Pa. St. 279; *Carroll v. Sprague*, 59 Cal. 655; *Oliver v. Cameron*, 4 McAr. 237; *State v. Mewherter*, 46 Iowa, 88.

⁵ *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 406; *State v. White*, 19 Kan. 445; 27 Am. Rep. 137.

⁶ *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333.

The communication is privileged, though the attorney did not consider himself as acting for the party, if the latter was under the impression that he was.¹ The privilege extends only to the attorney or counsel himself, and to those whose intervention is strictly necessary to enable the client to communicate with him.² The following are therefore within the rule: a clerk of the attorney,³ or an interpreter.⁴ The privilege does not extend to a student at law in a lawyer's office;⁵ nor to one not licensed as attorney;⁶ nor to a mere conveyancer not a lawyer;⁷ nor to one whom the party supposed to be an attorney, and whom he employed as such, but who, although doing business as a member of the bar, was not in fact admitted at that time;⁸ nor to a witness who had been employed to assist him in a trial, but who was not an attorney, counselor, or solicitor;⁹ nor to third persons present when the communication is made.¹⁰

It has been held that the attorney cannot be compelled to testify whether or not a note placed in his hands by a client was indorsed, or had writing on its back, or not;¹¹ or as to the condition and appearance of a deed of trust and notes, at the time they were placed in his hands for foreclosure;¹² or as to a communication made in refer-

¹ *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321.

² *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415.

³ *Landsberger v. Gorham*, 5 Cal. 455; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Sibley v. Waffle*, 16 N. Y. 183.

⁴ *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699.

⁵ *Andrews v. Solomon*, Pet. C. C. 356; *Barnes v. Harris*, 7 Cush. 576; 54 Am. Dec. 734.

⁶ *McLaughlin v. Gilmore*, 1 Ill. App. 563; *aliter*, as to one licensed to practice before a justice of the peace or in the county court: *Scales v. Kelly*, 2 Lea, 706. And in Ohio, communications made to one not an attorney of the courts of record, but whose regular business had long been that of

practicing before justices of the peace, was held privileged: *Benedict v. State*, 44 Ohio St. 679.

⁷ *Matthews's Estate*, 1 Phila. 292.

⁸ *Sample v. Frost*, 10 Iowa, 266.

⁹ *Brayton v. Chase*, 3 Wis. 456.

¹⁰ *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Weinstein v. Reid*, 25 Mo. App. 41. But in a Texas case an attorney's mother-in-law, being present at a time when professional communications were made to the attorney, overheard them; it was held that she could be required to testify concerning them: *Walker v. State*, 19 Tex. App. 176. See next section.

¹¹ *Dietrich v. Mitchell*, 43 Ill. 40; 92 Am. Dec. 99.

¹² *Gray v. Fox*, 43 Mo. 570; 97 Am. Dec. 416.

ence to personal estate, on retaining him to draw an affidavit for the reduction of the assessment on the estate;¹ nor that while attorney of plaintiff he furnished the defendant's agent with a specification of plaintiff's claim, which was different from that now presented;² nor as to what claim or title he was employed to maintain;³ nor (in a prosecution for stealing silver coin) that his retaining fee was paid in silver;⁴ nor statements made to him in regard to the preparation of a will;⁵ or made at the time that he drafted for the client an affidavit on which perjury was assigned;⁶ nor as to what his client, the assignor, said at the time of his drawing it, with reference to his intent or purpose in making the assignment;⁷ or as to communications made to him in his professional capacity, by an owner of property, respecting a transfer of it;⁸ or as to any facts which came to his knowledge, as such, when objecting or consenting to the examination of his client as a witness;⁹ or to communications made to a prosecuting attorney relative to criminals or suspected persons;¹⁰ or as to communications made to an attorney employed simply to draw up a contract or conveyance.¹¹ An attorney retained by the husband to aid in having land, bought by the husband at chancery sale, conveyed to the wife, cannot disclose any communication made pending the relation touching the purposes of the con-

¹ *Williams v. Fitch*, 18 N. Y. 546.

² *Hicks v. Blanchard*, 60 Vt. 673.

³ *Chirac v. Reinicker*, 11 Wheat. 280; *Stephens v. Mattox*, 37 Ga. 289.

⁴ *State v. Dawson*, 90 Mo. 149.

⁵ *Bennett's Estate*, 13 Phila. 331.

⁶ *Hernandez v. State*, 18 Tex. App. 134.

⁷ *Hollenback v. Todd*, 119 Ill. 543.

⁸ *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 3 Watts, 20; 27 Am. Dec. 330.

⁹ *Hodges v. Mullikin*, 1 Bland, 503.

¹⁰ *Oliver v. Pate*, 43 Ind. 132; *Young*

v. State, 65 Ga. 525; *Vogel v. Gruaz*, 110 U. S. 311.

¹¹ *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; *Bank v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Getzlaff v. Seliger*, 43 Wis. 297; *Crane v. Barkdoll*, 59 Md. 534; *Linthicum v. Remington*, 5 Cranch C. C. 546; *Moore v. Bray*, 10 Pa. St. 519; *contra*, *De Wolf v. Strader*, 28 Ill. 225; 79 Am. Dec. 371; *Smith v. Long*, 106 Ill. 488; *Hebbard v. Haughian*, 70 N. Y. 61; *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415; *Borum v. Fouts*, 15 Ind. 50; *Randal v. Yates*, 48 Mass. 685; *Machette v. Wanless*, 2 Col. 169; *Todd v. Munson*, 53 Conn. 579.

veyance.¹ The burden lies on him who seeks to exclude communications as privileged, to show facts constituting the privilege.² But the rule should be enforced by the court, of its own motion.³ The opinion of the attorney that the communications are privileged is entitled to great weight.⁴ But an attorney who is called as a witness in a proceeding in bankruptcy is not entitled to add to the oath which he takes a reservation of a right to refuse to answer any question on the ground of privilege as the attorney or counsel of the bankrupt.⁵

ILLUSTRATIONS.—A practicing attorney also carried on a liquor store. R., one of his clients, called on him there, and in presence of several others put a supposed case to him, and asked him, if such a case existed, would there be any liability. The attorney gave his opinion, and asked if the case put was a certain real transaction, and R. said it was. No such case was then pending. R. paid no fee, there was no general retainer, and the attorney was never engaged in the real case. The supposed case afterward arising, the attorney testified on the trial to the interview, and that he did not consider that R. was advising with him as counsel at that time. *Held*, improper: *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627. A, one of two plaintiffs, called upon B, an attorney, to employ him to bring a suit on an official bond of a justice of the peace. No fee was paid, and circumstances prevented B from bringing the suit; but, at the time, A made statements in regard to the subject-matter of said suit, which the defendant in the present case proposed to prove against A. *Held*, that the circumstances were privileged: *Reed v. Smith*, 2 Ind. 160. A foreigner, about to sue a debt, employed one X. to act as interpreter in stating the case to her attorneys. The action was brought, and X. swore to an admission by the debtor of the indebtedness. The defendant offered to show, by the attorneys of the plaintiff, that X. had said to them in his statement of the case to them that he never heard such admission. *Held*, that the evidence was inadmissible: *Maas v. Bloch*, 7 Ind. 202. In order to show assent by the original parties to the alteration of a note, evidence was offered of their having proposed to the plaintiff's counsel to confess judgment on the note if he thought they could do it with safety. *Held*, a professional consultation and inadmissible:

¹ *Lockhard v. Brodie*, 1 Tenn. Ch. 384.

² *Barie v. Grout*, 46 Vt. 112.

³ *People v. Atkinson*, 40 Cal. 284.

⁴ *Orton v. McCord*, 33 Wis. 203.

⁵ *Matter of Adams*, 6 Ben. 56.

Bowers v. Briggs, 20 Ind. 139. A consulted B, an attorney at law, to draw a conveyance of his property to C, and at the same time made communications to B in regard to the object of the conveyance, and B declined the employment. *Held*, made to B in his professional character, and inadmissible: *Crisler v. Garland*, 11 Smedes & M. 136; 49 Am. Dec. 49. A solicitor employed to foreclose a mortgage, being examined as witness, was asked whether he had received any written instructions from his client, in relation to the sale and the amount to be bid by him. *Held*, inadmissible, being a matter of professional confidence: *Stuyvesant v. Peckham*, 3 Edw. Ch. 579. In an action on a promissory note the plaintiff's attorney was called as a witness to prove that the note was not the property of the plaintiff. He declined to state any communications made to him by his client. *Held*, that they were privileged: *Miller v. Weeks*, 22 Pa. St. 89. By the admissions of a party, a champertous contract was established between him and his attorney. *Held*, that such attorney was not a competent witness to prove the falsity of his client's statements, and that no such contract was entered into: *Dowell v. Dowell*, 3 Head, 502. In an action against the grantees in a deed, upon a covenant therein that they would assume and pay certain specified encumbrances, as portions of the purchase-money, an attorney and counselor who drew the deed was asked whether the deed was read over to the grantees after it was drawn; and whether the question was raised, then, as to whether the grantees would be personally liable on the deed. *Held*, inadmissible, as calling for privileged communications between attorney and client: *Rogers v. Lyon*, 64 Barb. 373. M. told his attorney, who assisted him in the confession of a judgment against himself in favor of a creditor, that he did it that he might have his piano sold on execution so his other creditors could not attach it. The court allowed the attorney to determine whether he would disclose the communication, and he refused. *Held*, that the communication was privileged, and that the fact that the court allowed the attorney to determine whether he would testify or not was not material: *Maxham v. Place*, 46 Vt. 434. An attorney testified that he had advised a client seeking to collect a claim for intoxicating liquors to get a promissory note signed by the debtor, and to indorse it for value before it was due to an innocent third person. *Held*, in an action on the note, a violation of the rule excluding privileged communications: *Higbee v. Dresser*, 103 Mass. 523.

§ 147. **Privileged Communications—Exceptions to the Rule.**—But the rule is not enforced to the prejudice of

the attorney, or where it will deprive him from obtaining or defending his rights. Hence in a suit between attorney and client, the former may disclose communications made to him when such disclosure is essential to his rights.¹ In a suit against an attorney for disobedience of instructions, he may, as a witness, disclose confidential communications with the client.² A letter from a client to an attorney, complaining that the latter has betrayed his trust in certain matters, and stating that these facts have been communicated to another lawyer for the purpose of obtaining a settlement with the dishonest attorney, is not privileged;³ and the communication is not privileged when made in the presence of the other party to the suit or proceeding;⁴ or where made to third persons present at the time, or by other persons to each other or to the client;⁵ or to the attorney;⁶ or where they are overheard by a third person;⁷ or a communication made by a party to a suit to an attorney, to be communicated to the adverse party;⁸ nor where the attorney is himself a party to the transaction;⁹ nor where the communications are made by the client to the attor-

¹ *Mitchell v. Bromberger*, 2 Nev. 345; 90 Am. Dec. 556; *Rochester etc. Bank v. Suydam*, 5 How. Pr. 254.

² *Nave v. Baird*, 12 Ind. 318.

³ *Laffin v. Herrington*, 1 Black, 326.

⁴ *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385; *Britton v. Lorenz*, 45 N. Y. 57; *Parish v. Gates*, 29 Ala. 254; *Carr v. Weld*, 18 N. J. Eq. 41.

But where communications are made to an attorney by either of two or more parties in the presence of the others, while he is employed as their common attorney in matters in which they are mutually interested, and in which their interests are adverse, such communications are privileged in a suit between them, or either of them, and a third person: *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495.

⁵ *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 115; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Goddard v. Gardner*, 28 Conn.

172; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *Mobile etc. R. R. Co. v. Yeates*, 67 Ala. 164.

⁶ *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415; *Perkins v. Guy*, 55 Miss. 153; 30 Am. Rep. 510; *Randolph v. Quidnick Co.*, 23 Fed. Rep. 278; *Althouse v. Wells*, 40 Hun, 336.

⁷ In this case the third person may be compelled to testify as to them: *Hoy v. Morris*, 13 Gray, 519; 74 Am. Dec. 650.

⁸ *Henderson v. Terry*, 62 Tex. 281.

⁹ Thus where an attorney was summoned as garnishee in an attachment suit, it was held that he was bound to answer interrogatories as to whether he had received from his client a sum of money in trust to pay a certain percentage to such of his creditors as would accept the same in full satisfaction of their respective debts: *Jeanes v. Fridenberg*, 3 Pa. L. J. 199; *Williams v. Young*, 46 Iowa, 140.

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ney of the other party;¹ nor where they are made to an attorney who is acting for both parties;² nor where it is made for criminal or unlawful purposes,³ except where it is not in any manner necessarily connected with the perpetration of the crime, and cannot in any way aid in the commission of any fraud or crime;⁴ nor where made to satisfy the attorney's scruples as to the transaction, and without any view of obtaining his professional advice or opinion;⁵ nor where no retainer was paid, and there "was nothing to show that the plaintiffs sought the advice with any view to regulate his future conduct in regard to a pending or expected litigation";⁶ nor when it is as to collateral facts, as, for example, the hand-writing of the client;⁷ or that a bond was lodged with the client by way of indemnity, and that he expressed himself satisfied with certain security;⁸ or the terms of a compromise offered by him to the client's credi-

¹ McLean v. Clark, 47 Ga. 73; Mayer v. Hermann, 10 Blatchf. 256.

² Gulick v. Gulick, 39 N. J. Eq. 516. Where two persons employ an attorney in the same business, communications made by them in pursuance of such common retainer are not privileged *inter se*: Gulick v. Gulick, 39 N. J. Eq. 516; Cady v. Walker, 62 Mich. 157; 4 Am. St. Rep. 834; Hanlon v. Doherty, 109 Ind. 37; Goodwin Gas Stove Co.'s Appeal, 117 Pa. St. 514; 2 Am. St. Rep. 696. Where an attorney acts for several parties in the same transaction, he cannot testify as to what took place between them and a third person unless all of his clients consent, but as between the parties themselves, he can tell what was said and done: Michael v. Foil, 100 N. C. 179; Goodwin Gas Stove etc. Co.'s Appeal, 117 Pa. St. 314; 2 Am. St. Rep. 696.

³ People v. Blakeley, 4 Park. Cr. 176; Coveney v. Tannahill, 1 Hill, 33; 37 Am. Dec. 289; Orman v. State, 22 Tex. App. 604; 58 Am. Rep. 663; Dudley v. Beck, 3 Wis. 274; People v. Mahon, 1 Utah, 205; People v. Van Alstine, 57 Mich. 69; State v. McChesney, 16 Mo. App. 259. Defendant, on trial for

murder, had consulted an attorney to know what the law was if he should kill deceased, from whom he had received great provocation. The communication was held not privileged: Orman v. State, 22 Tex. App. 604; 58 Am. Rep. 662. Where the object is simply fraud, the communication is privileged: Bank v. Mercereau, 3 Barb. Ch. 528; 49 Am. Dec. 189.

⁴ Graham v. People, 63 Barb. 468.

⁵ Hatton v. Robinson, 14 Pick. 416; 25 Am. Dec. 415.

⁶ Thompson v. Kilborne, 28 Vt. 750; 67 Am. Dec. 742. But to constitute the relation so as to render the communication privileged, it is not essential that the attorney shall have received a retainer or fee: Crisler v. Garland, 11 Smedes & M. 136; 49 Am. Dec. 49; March v. Ludlum, 3 Sand. Ch. 3; McMannus v. State, 2 Head, 213; Cross v. Riggins, 50 Mo. 335; Andrews v. Simms, 33 Ark. 771. It is privileged, although the advice was given upon a hypothetical statement of the facts, and the attorney had no general retainer: Bacon v. Frisbie, 15 Hun, 26.

⁷ Johnson v. Davenport, 19 Johns. 134; 10 Am. Dec. 198.

⁸ Heister v. Davis, 3 Yeates, 4.

tors;¹ or the contents of a lost will drawn up by him;² nor as to the existence of a paper,³ or the execution of a deed; its date, whether it has been altered, and the date of its delivery;⁴ nor by whom he was employed;⁵ or the fact of his employment,⁶ or the names of the persons who intrusted him with papers and their purpose;⁷ nor to the fact that he brought suit for a certain person, recovered judgment, and paid it over to a third person on the order of his client;⁸ nor as to the contents of receipts in his possession which the client could be compelled to produce;⁹ nor as to the fact that the attorney appeared for the party without authority;¹⁰ nor to the fact that the client was too imbecile to make communications to his counsel;¹¹ nor to the fact that the client called himself by a certain name;¹² nor as to how he obtained possession of a paper which is the basis of his client's suit;¹³ nor as to the amount of an attorney's fee, and the terms on which it was paid;¹⁴ nor to facts which the attorney might have known without being such attorney;¹⁵ nor to knowledge acquired from other sources, and not from the client;¹⁶ nor to a communication (the prosecuting attorney being the witness) made by the party before the grand jury;¹⁷ nor as to any agreement made with the opposite party at the request of his own client;¹⁸ nor that he had once been employed by

¹ *McTavish v. Denning*, Anth. 155.

² *Graham v. O'Fallon*, 4 Mo. 338.

³ *Coveney v. Tannahill*, 1 Hill, 32; 37 Am. Dec. 287; *Mitchell's Case*, 12 Abb. Pr. 259; nor as to its ownership: *De Witt v. Perkins*, 22 Wis. 473.

⁴ *Bank v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Rundle v. Foster*, 3 Tenn. Ch. 658.

⁵ *Chirac v. Reinicker*, 11 Wheat. 280; *Satterlee v. Bliss*, 36 Cal. 489; *Martin v. Anderson*, 21 Ga. 301; *Brown v. Payson*, 6 N. H. 443; *Gower v. Emery*, 18 Mo. 79; *Mulford v. Muller*, 3 Abb. App. 330.

⁶ *Brigham v. McDowell*, 19 Neb. 407.

⁷ *Reynolds v. Rowley*, 3 Rob. 201; 38 Am. Dec. 233.

⁸ *Fulton v. Maccracken*, 18 Md. 528; 81 Am. Dec. 620.

⁹ *Andrews v. Railroad Co.*, 14 Ind. 169; *Ex parte Maulsby*, 13 Md. 625.

¹⁰ *Cox v. Hill*, 3 Ohio, 411.

¹¹ *Daniel v. Daniel*, 29 Pa. St. 191.

¹² *Commonwealth v. Bacon*, 135 Mass. 521.

¹³ *Allen v. Root*, 39 Tex. 589.

¹⁴ *Smithwick v. Evans*, 24 Ga. 461; *Shaughnessy v. Fogg*, 15 La. Ann. 330.

¹⁵ *Stoney v. McNeil*, Harp. 557; 18 Am. Dec. 666.

¹⁶ *Crosby v. Berger*, 11 Paige, 379; 42 Am. Dec. 117; *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *Chirac v. Reinicker*, 11 Wheat. 280; *Rhoades v. Selin*, 4 Wash. 715; *Bogert v. Bogert*, 2 Edw. Ch. 399; *Rogers v. Dare*, Wright, 136.

¹⁷ *State v. Van Buskirk*, 59 Ind. 384.

¹⁸ *Thayer v. McEwen*, 4 Ill. App. 416.

certain parties to bring some suits for them as a firm;¹ nor for an attorney who prepares a bill in equity signed and sworn to by his client, and filed in court, to testify where his client was described in said bill as residing;² nor to facts learned from the opposite party, who told them to the counsel, desiring to retain him, but after he had been retained by his present client;³ nor to information received from the party by one in the character of a friend, and not as counsel;⁴ nor to information received when not acting as attorney, though he manages the general affairs of the party;⁵ nor to an alleged admission of payment, made by his client after judgment recovered, and before execution was issued, while the attorney's authority to issue execution and satisfy the judgment continued;⁶ nor where one has been tried and acquitted, and no other proceedings in relation to the indictment, its trial, or the offense charged in it appear to have been in contemplation, and the party tried has afterwards a conversation with the person who acted as his counsel in the proceedings, but upon a matter unconnected with them;⁷ nor where the statement was not made with the object of obtaining professional advice;⁸ nor to communications made by one who is only a nominal party to the suit, and has no interest in it;⁹ nor to acts done in his presence, as the execution of a writing or the signing of a deed, etc;¹⁰ nor to prove the execution of a power to himself where he appears under a power;¹¹ nor to prove matters which occurred on the trial in open court, against his

¹ *Wallo v. Beckwith*, 1 N. Mex. 182.

² *Alden v. Goddard*, 73 Me. 345.

³ *Thompson v. Wilson*, 29 Ga. 539.

⁴ *Goltra v. Wolcott*, 14 Ill. 89; *Hoffman v. Smith*, 1 Caines, 157.

⁵ *Wilson v. Godlove*, 34 Mo. 337.

⁶ *Clark v. Richards*, 3 E. D. Smith, 89.

⁷ *Mandeville v. Guernsey*, 38 Barb. 225.

⁸ *Marsh v. Howe*, 36 Barb. 649; *Brandon v. Gowing*, 7 Rich. 459; *Al-*

derman v. People, 4 Mich. 414; 69 Am. Dec. 321; *Flack v. Neill*, 25 Tex. 273; *McMannus v. State*, 2 Head, 213; *Coon v. Swan*, 30 Vt. 6; *Lynde v. McGregor*, 13 Allen, 182; 90 Am. Dec. 188.

⁹ *Allen v. Harrison*, 30 Vt. 219; 73 Am. Dec. 303.

¹⁰ *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287; *Patten v. Moor*, 29 N. H. 163.

¹¹ *Caniff v. Myers*, 15 Johns. 245.

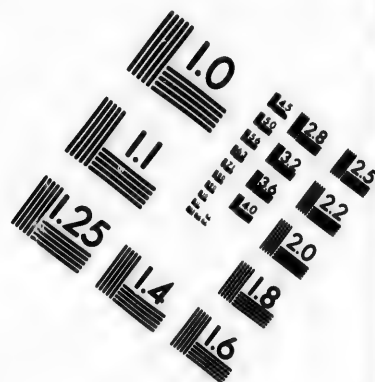
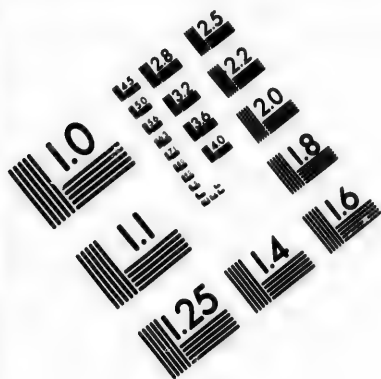
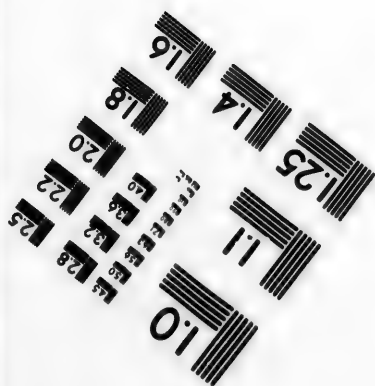
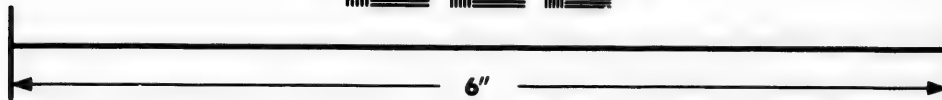
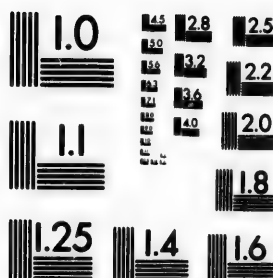


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client, as, for instance, what title was in question therein;¹ nor when he acted as the agent of the lender, in negotiating a mortgage, as to what passed between him and the borrower with relation to alleged usury.² On a question of marriage and legitimacy, an attorney who drew a will for the alleged husband now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation of the will.³ An attorney for a defendant on a criminal charge before a magistrate, who subsequently withdraws from the case, may be required to testify at the subsequent trial to the testimony given by a witness at such examination, although he states that he can only do so by refreshing his recollection by his minutes taken at the examination, which are not full, and that he may not be able to give the testimony with entire accuracy.⁴ Where the surety for a county official sues his principal for money paid to his use in satisfying his bond to the public, the testimony of the prosecuting attorney is not privileged if he obtained his information as the law officer of the county, and as a member of a committee appointed to obtain a surrender of the principal's property in settlement of his liabilities to the public.⁵ No privilege can be claimed by a trustee, as against his *cestui que trust*, for letters passing between the trustee and his solicitor relating to the trust before action brought.⁶

The privilege is the privilege of the client, and may be waived by him;⁷ but such waiver must be distinct and

¹ *Levers v. Van Buskirk*, 4 Pa. St. 309.

² *Woodruff v. Hurson*, 32 Barb. 557.

³ *Blackburn v. Crawfords*, 3 Wall. 175.

⁴ *Commonwealth v. Goddard*, 14 Gray, 402.

⁵ *Lange v. Perley*, 47 Mich. 352.

⁶ *Mason v. Cattley*, 48 L. T., N. S., 631.

⁷ *Chase's Case*, 1 Bland Ch. 206; 17 Am. Dec. 277; *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec.

unconditional.¹ It is waived by the client offering himself as a witness,² or by his calling upon the attorney to testify.³ The fact that an attorney's client accused of a crime turns state evidence does not entitle the attorney to testify concerning confidential communications.⁴ If, after the relation of attorney and client has ceased, the client voluntarily repeats to the attorney what he had communicated while that relation existed, the attorney is a competent witness as to this communication.⁵ Where the privileged communication is made by or affects several clients, a majority of them cannot waive the privilege against the wish of the others, though the dissentients are not parties to the suit in which the attorney is called to testify.⁶ The common attorney of two or more parties adverse in interest cannot testify in a suit between one of them and a third person to communications made between them in his presence, before suit, while he was acting as such attorney in respect to the matter in question.⁷

ILLUSTRATIONS. — A client wrote to his attorney to bring a suit for divorce at once, so that his wife might have time to think of the matter, and perhaps consent to a quiet separation without public scandal. He also orally instructed him to withdraw the suit if a jury trial could not be avoided. *Held*, that in an action by the attorney for services in that suit, evidence of those instructions was proper: *Snow v. Gould*, 74 Me. 540; 43 Am. Rep. 604. One, by profession an attorney, was endeavoring, merely as a neighbor, and without any suit in court, to procure from an insurance company the allowance of a claim in favor of another, without anything being said by either party in regard to his being engaged in the matter or paid for his services, and with no intention or expectation on his part to

599; *Passmore v. Passmore*, 50 Mich. 626; 45 Am. Rep. 62; *Rowland v. Plummer*, 50 Ala. 182; *Sleeper v. Abbott*, 60 N. H. 162.

¹ *Tate v. Tate*, 75 Va. 522.

² *Inhabitants v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333; *King v. Barrett*, 11 Ohio St. 261; *Oliver v. Pate*, 43 Ind. 132; *contra*, *Duttenhofer v. State*, 34 Ohio St. 91.

³ *Crittenden v. Strother*, 2 Cranch

C. C. 464; *Fossler v. Schriber*, 38 Ill. 172; *Riddles v. Aikin*, 29 Mo. 453; *Benjamin v. Coventry*, 19 Wend. 353.

⁴ *Sutton v. State*, 16 Tex. App. 490.

⁵ *Yordan v. Hess*, 13 Johns. 492.

⁶ *Bank of Utica v. Mercereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189.

⁷ *Root v. Wright* 34 N. Y. 72; 38 Am. Rep. 495; *Hull v. Lyon*, 27 Mo. 570.

charge anything therefor. *Held*, that admissions made to him by the claimant, while assisting him in this way, in regard to the nature of his claim, were not privileged: *Coon v. Swan*, 30 Vt. 6. An attorney for a trust estate was employed to draw a deed from the trustee to the *cestui* and a mortgage back. *Held*, that statements made in his presence by one to the other were not privileged: *Moffatt v. Hardin*, 22 S. C. 9. An attorney who was a witness in his client's favor was compelled by *subpœna duces tecum* to produce a written agreement with his client which showed that his fees were partly contingent upon the result of the suit. *Held*, proper: *Moats v. Rymer*, 18 W. Va. 642; 41 Am. Rep. 703. A and B called on an attorney and requested him to make a bill of sale from A to B. The attorney refused, telling them that he was engaged on the other side of the business. *Held*, on the issue of the *bona fides* of a similar bill of sale, that the attorney was competent to testify to the above: *Tucker v. Finch*, 66 Wis. 17. An attorney examined as a witness in bankruptcy proceedings, and questioned concerning a certain conveyance made to him by the bankrupt and wife, and a subsequent conveyance to him by the wife, refused to testify thereon as matter within the privilege of confidential communications between attorney and client. *Held*, that the questions were not within such privilege: *In re Bellis*, 3 Ben. 386. A bill of particulars in a suit pending was prepared for the plaintiff under his direction, by a person not an attorney at law, and by the latter handed to plaintiff's attorney, who made no use of it, as the case was settled. The paper afterwards came into the hands of the executor of the other party, and became important evidence in favor of the estate upon a claim presented by the former plaintiff against it. *Held*, that it was not a privileged communication: *Pulford's Appeal*, 48 Conn. 247.

§ 148. **To Become Surety for Client.**—In England attorneys have always—on grounds of public policy—been prevented from becoming bail or surety for their clients,¹ or in the courts in which they practice.² This rule has been adhered to in the United States;³ sometimes by statute, sometimes by rule of court or judicial decision.⁴

¹ Weeks on Attorneys, sec. 119.

² Weeks on Attorneys, sec. 119.

³ *Coster v. Watson*, 15 Johns. 535; *Love v. Sheffelin*, 7 Fla. 40; *Massie v. Mann*, 17 Iowa, 131; *Miles v. Clarke*, 4 Bosw. 632; *Gilbank v. Stephenson*, 30 Wis. 155; *Branger v. Buttrick*, 30 Wis. 153.

⁴ Under the Wisconsin statutes, an attorney at law practicing in any county in the state is absolutely disqualified from being surety in an undertaking in any action, and not merely in one in which he is professionally interested: *Gilbank v. Stephenson*, 30 Wis. 155; *Branger v.*

In some courts, however, attorneys have been permitted to become sureties for their clients.¹ An attorney who undertakes to obtain bail for his client will be held responsible for any fraud or deception on the court in obtaining and justifying the bail.²

§ 149. **To be Witness in Cause.**—An attorney is not disqualified from being a witness in his client's case,³ though such a practice has been frequently discouraged by courts.⁴ The case of a counsel who examines the other witnesses, and addresses the jury, appearing himself as a witness in the cause, seems still stronger. But there seems to be no satisfactory adjudication in this country except those maintaining his competency,⁵ though

Buttrick, 30 Wis. 153. A rule of court that no attorney shall be a surety except with the consent of the court is directory, and his act in becoming one is neither void nor voidable: *Kohn v. Washer*, 69 Tex. 67.

¹ *Walker v. Holmes*, 22 Wend. 614; *Church v. Drummond*, 7 Ind. 17; *Ryckman v. Coleman*, 13 Abb. Pr. 398; *Dillon v. Watkins*, 2 C. C. 445; *Willmont v. Meserole*, 48 How. Pr. 430; *Sigourney v. Waddle*, 9 Paige, 381; *Micklethwaite v. Rhodes*, 4 Sandf. Ch. 434.

² *In re Hirst*, 9 Phila. 216.

³ *Robinson v. Dauchy*, 3 Barb. 20; *Little v. McKeon*, 1 Sand. 607; *Reed v. Colcock*, 1 Nott & McC. 592; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Newman v. Bradley*, 1 Dall. 240; *Phillips v. Bridge*, 11 Mass. 246; *Frear v. Drinker*, 8 Pa. St. 520; *Folley v. Smith*, 12 N. J. L. 139; *Boulden v. Hebel*, 17 Serg. & R. 312. "An attorney can recover ordinary witness fees when he offers himself as a witness in his own case: *Leaver v. Whalley*, 2 Dowl. 80; *Taaks v. Schmidt*, 25 How. Pr. 340; or is called in another's case during his regular attendance at that term: *Parks v. Brewer*, 14 Pick. 192; *Marshall v. Parsons*, 4 Jur. 1017; *Abbott v. Johnson*, 47 Wis. 239; but fees when so in attendance were refused in *McWilliams v. Hopkins*, 1 Whart. 276; *Crummer v. Huff*, 1

Wend. 25; *Jones v. Botsford*, 1 Pug. & Bur. 581; see *Reynolds v. Walker*, 7 Hill, 144. Where the cause was conducted by one member of a firm of attorneys, the fees of another member called as a witness were allowed: *Pattler v. Hobson*, 5 Bing. N. C. 128; 1 Arn. 434. *Quere*, whether an attorney who calls himself as a witness can now recover his fees, since other parties calling themselves cannot: *Grinnell v. Dennison*, 12 Wis. 402; *Hale v. Merrill*, 27 Vt. 738; *Nichols v. Brunswick*, 3 Cliff. 88; *Parker v. Martin*, 3 Pitts. 166; *Grub v. Simpson*, 6 Heisk. 92; *Delcomyn v. Chamberlain*, 48 How. Pr. 409; *Stratton v. Upton*, 36 N. H. 581; see *Howes v. Barber*, 18 Q. B. 588." Mr. Stewart's note to *Flaacke v. Jersey City*, 33 N. J. Eq. 60.

⁴ See *Spencer v. Kinnard*, 12 Tex. 180; *Stratton v. Henderson*, 26 Ill. 68; *Little v. McKeon*, 1 Sand. 607; *State v. Woodside*, 9 Ired. 496; *Frear v. Drinker*, 8 Pa. St. 520; and see *Churchill v. Corker*, 25 Ga. 479.

⁵ *Potter v. Inhabitants*, 1 Cush. 519. In *Follansbee v. Walker*, 72 Pa. St. 230, 13 Am. Rep. 671, the law was reviewed by Read, J., as follows: "On the trial of this case, A. S. Foster, Esq., was offered as a witness on the part of the defense, objected to by the plaintiff's counsel, and rejected by the court for the following reason: 'Mr. Foster is

it has been otherwise ruled in England, and Mr. Wharton seems not to favor the practice.¹ In California it is said that there is no rule of law which prohibits an attorney of record, who is a witness in a case, from summing it up before the court or jury. If a rule of the court prohibits such attorney from arguing a case without permission of the court, the court may give such permission.²

§ 150. Liability to Third Persons.—The members of a firm of attorneys are liable for the acts of each other in

attorney for the defendant Follansbee, opened the case for him to the jury, and examined the witnesses for said defendant, and the court, on this ground, excludes him as a witness.' This is assigned for error. In *Frear v. Drinker*, 8 Pa. St. 521, Mr. Justice Rogers says: 'It is also contended an attorney is not a competent witness for his client. In England it has been lately ruled that an attorney is not to give evidence under certain circumstances.' He cites two cases: before Mr. Justice Patteson and Mr. Justice Erle, and he says: 'The furthest the court has yet gone is to discourage the practice of acting in the double capacity of attorney and witness, but there is nothing to prohibit an attorney from being a witness for his client when he does not address the jury. . . . It is said and I agree that it is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witnesses. It is a practice, which, as far as possible, should be discountenanced by courts and counsel. But these cases are not open to this objection, because it appears negatively that the counsel did not address the jury. It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client.' In the earlier cases in Pennsylvania, the objection to the examination of the attorney in the cause was his interest in it, as in the case of the late Judge Baldwin in *Miles v. O'Hara*, 1 Serg. & R. 32, in 1814. In the first case, *Newman v. Bradley*, 1 Dall. 240, in the year 1788,

Howell, who was of counsel for the plaintiff, gave the chief evidence to support the action, and he and Tol argued the cause before the jury, and there was a verdict for the plaintiff. 'When Howell offered himself as a witness, Levy objected that he was interested, inasmuch as his judgment fee depended on his success in the cause. But the objection was overruled by the court.' The two English cases cited by Judge Rogers have since been overruled. Pitt Taylor, in the second volume of his treatise on the law of evidence, page 1170, section 1240, fourth edition, thus states the law: 'The judges at *nisi prius* were at one time inclined to regard as *incompetent to testify* all persons, whether counsel, attorneys, or parties, who being engaged in a cause had actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence. Further investigation of the subject, however, has led to a judicial acknowledgment that no such practice exists.' The authority for this, *Corbett v. Hudson*, 22 L. J. Q. B. 11, 1852, the judgment of the court (of which Mr. Justice Erle was one), being delivered by Lord Campbell, C. J. The question may therefore be considered as settled in England and Pennsylvania, and also in Massachusetts: *Potter v. Inhabitants of Ware*, 1 Cush. 519. There was therefore error in holding Mr. Foster was not a competent witness."

¹ Wharton on Evidence, sec. 420.

² *Branson v. Caruthers*, 49 Cal. 374.

the firm business.¹ An attorney, like any other agent, is liable to a third person for money collected by him which he pays over after notice of his claim.² Attorneys in the exercise of their proper functions as such are not liable for their acts when performed in good faith, and for the honest purpose of protecting the interests of their clients.³ An attorney who, by his representations and promised indorsement, induces a party to take an assignment of a debt placed in his hands for collection by way of payment of a note against his client, thereby becomes personally responsible to the assignee for its collection.⁴

ILLUSTRATIONS.—An attorney collects money for and pays it over to his client. A third person shows himself entitled to the money. *Held*, that he cannot recover it from the attorney: *Wilmerdings v. Fowler*, 55 N. Y. 641.

§ 151. Liability for Acting without Authority.—An attorney is liable to a third person for acting for him and in his name without authority.⁵

§ 152. Liability to Third Persons on Implied Contracts.—He is liable for work done in his client's affairs by another at his request when it is done as assistance to himself personally in matters properly devolving upon himself; but he is not liable, where it is for his client's advantage, and not his own, even though he expressly request it.⁶ But he is liable for money advanced by a third person to prosecute the action, the credit of the client not being pledged to repay it.⁷ He is not liable for the charges of a person employed to examine partnership books for the purposes of the trial.⁸

¹ *Green v. Milbank*, 3 Abb. N. C. 138; *Smyth v. Harris*, 31 Ill. 62; 83 Am. Dec. 202.

² *Sims v. Brown*, 6 Thomp. & C. 5; 64 N. Y. 660.

³ *Campbell v. Brown*, 2 Woods, 349.

⁴ *Hazlrigg v. Brenton*, 2 Duvall, 525.

⁵ *Smith v. Bowditch*, 7 Pick. 138; *Jones v. Wolcott*, 2 Allen, 247; *Field*

v. Gibbs, Pet. C. C. 155; *Coit v. Sheldon*, 1 Tyler, 304; *Munnikuyson v. Dorsett*, 2 Har. & G. 374; *People v. Bradt*, 6 Johns. 318; *Bradt v. Walton*, 8 Johns. 298; *Spaulding v. Swift*, 18 Vt. 214; *Adams v. Robinson*, 1 Pick. 461.

⁶ *Weeks on Attorneys*, sec. 127.

⁷ *Bell v. Mason*, 10 Vt. 509.

⁸ *Covell v. Hart*, 14 Hun, 252.

ILLUSTRATIONS. — A, an attorney employed to conduct a suit, employed B, another attorney, to assist him, but did not profess to employ him on behalf of his client, nor did it appear that he had authority so to do, and he was the only person who did employ B. *Held*, that A was personally responsible without proof of an express promise: *Scott v. Hozsie*, 13 Vt. 50.

§ 153. **Liability for Costs and Fees.**—The attorney may be made liable personally for the costs of the cause, where he is guilty of gross negligence or misbehavior,¹ as where he draws up and signs an impertinent pleading,² or makes unnecessary and frivolous motions.³ Where the opposite party to the suit has been forced to pay costs through the ignorance or misbehavior of the attorney, the latter will be ordered to reimburse him instead of his client.⁴ An attorney who brings an action in the name of another, in which he is beneficially interested by virtue of an agreement, that he shall have a portion of the recovery as compensation for his services, is liable, the same as the plaintiff, for defendant's costs.⁵ An attorney will be personally liable for the costs of a disbarment proceeding instituted in bad faith.⁶ The attorney is personally liable to the sheriff for his fees for serving or executing process which he has delivered to him,⁷ and for reasonable disbursements made by the officer in taking care of the property.⁸ But he is not personally liable for

¹ *Brown v. Brown*, 4 Ind. 627; *Love-land v. Jones*, 4 Ind. 184; *Ex parte Robbins*, 63 N. C. 309; *McVey v. Cantrell*, 8 Hun, 522; 70 N. Y. 295; 26 Am. Rep. 635.

² *Powell v. Kane*, 5 Paige, 265; 2 Edw. Ch. 450; *Cushman v. Brown*, 6 Paige, 539.

³ *Jordan v. National Shoe Bank*, 13 Jones & S. 423; *In re Kelly*, 6 Thomp. & C. 117.

⁴ *Weeks on Attorneys*, sec. 128; *Kane v. Van Vranken*, 5 Paige, 62; *Respass v. Morton*, Hardin, 226.

⁵ *Voorhees v. McCartney*, 51 N. Y. 387.

⁶ *In re Kelly*, 59 N. Y. 595; 62 N. Y. 198.

⁷ *Adams v. Hopkins*, 5 Johns. 252; *Campbell v. Cothran*, 56 N. Y. 279; *Trustees v. Cowen*, 5 Paige, 510; *Camp v. Garr*, 6 Wend. 535; *Ousterhout v. Day*, 9 Johns. 114; *Towle v. Hatch*, 43 N. H. 270; *Birbeck v. Stafford*, 14 Abb. Pr. 285; 23 How. Pr. 235; *Tilton v. Wright*, 74 Me. 214; 43 Am. Rep. 578; *Heath v. Bates*, 49 Conn. 342; 44 Am. Rep. 234; *Van Kirk v. Sedgwick*, 23 Hun, 37; *contra*, *Wires v. Briggs*, 5 Vt. 101; *Preston v. Preston*, 1 Doug. 292.

⁸ *Tarbell v. Dickinson*, 3 Cush. 346. In a New York case it is said that there is no relation between an attorney employed to prosecute a cause, and other officers of court, whose ser-

the fees of a referee;¹ nor of commissioners in partition;² or a stenographer;³ nor for witness' fees.⁴ In some states, by statute, an attorney is personally liable for costs, as, for example, where he institutes a suit for a non-resident plaintiff,⁵ or indorses the writ.⁶ He is liable for fees generally where he has a personal interest in the suit.⁷

vices become necessary in the course of it, which can give such officer the right to an attachment against the attorney to compel payment of his fees; not even where the attorney has collected the fees with the costs: *Lamoureux v. Morris*, 4 How. Pr. 245.

¹ *Howell v. Kinney*, 1 How. Pr. 105; *Moore v. Porter*, 13 Serg. & R. 100; *aliter*, *Trustees v. Cowen*, 5 Paige, 510; *Judson v. Gray*, 11 N. Y. 410, *Selden, J.*, saying: "It is a well-settled rule of the common law that where one person contracts, as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible. This rule is directly applicable to the case of attorney and client, and has been so applied whenever the question has arisen, except in New York state. It was thus applied in England, in the cases of *Hartop v. Jukes*, 1 Maule & S. 709; *Robins v. Bridge*, 3 Mces. & W. 114; and *Maybery v. Mansfield*, 9 Ad. & E. N. S., 758; in Vermont, in the cases of *Sargent v. Pettibone*, 1 Aiken, 355, and *Wires v. Briggs*, 5 Vt. 101; in Maryland, in the case of *Mad-dock v. Cranch*, 4 Har. & McH. 343; in Pennsylvania, in *Moore v. Porter*, 13 Serg. & R. 100; and in Michigan, in *Preston v. Preston*, 1 Doug. 292. The decisions in all these cases were based upon the general rule to which I have referred. In the case of *Robbins v. Bridge*, Lord Abinger says: 'The attorney is known merely as the agent, the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words.' So in *Wires v. Briggs*, the court say: 'No rule of law, it has been said, is better ascer-

tained, or stands upon a stronger foundation, than this: that where an agent names his principal, the principal is responsible, and not the agent'; and in *Preston v. Preston*, the language of *Felch, J.*, is: 'In conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client. The rule of law is well settled, that an agent does not become personally liable, unless his principal is unknown, or there is no responsible principal, or the agent exceeds his power, or becomes liable by an undertaking in his own name.'"

² *Lamoureux v. Morris*, 4 How. Pr. 245.

³ *Bonyng v. Field*, 12 Jones & S. 581; *Bonyng v. Waterbury*, 12 Hun, 534; *Sheridan v. Genet*, 12 Hun, 660. A request by an attorney to court officers, stenographers, etc., for performance of services incidental to a cause, does not raise an implied liability of the attorney to pay. Presumably the liability is upon the client: *Bonyng v. Waterbury*, 12 Hun, 534; *S. P.*, *Sheridan v. Genet*, 19 N. Y. Sup. Ct. 660.

⁴ *Sargent v. Pettibone*, 1 Aiken, 355.

⁵ *Jones v. Savage*, 10 Wend. 621; *Wright v. Black*, 2 Wend. 258; *People v. Marsh*, 3 Cow. 334; *Waring v. Barct*, 2 Cow. 460; *Carmichael v. Pendleton*, Dud. (Ga.) 173; *Alexander v. Carpenter*, 3 Denio, 266; *Ross v. Harvey*, 32 Ga. 388; *Christmas v. Russell*, 2 Met. (Ky.) 112; *Boyce v. Bates*, 8 How. Pr. 495; *Benson v. Whittfield*, 4 McCord, 149; *Willmont v. Meserole*, 16 Abb. Pr., N. S., 308.

⁶ *Davis v. McArthur*, 3 Mc. 27; *Chapman v. Phillips*, 8 Pick. 25; *Weeks on Attorneys*, sec. 129.

⁷ *Cone v. Donaldson*, 47 Pa. St. 363; *Voorhees v. McCartney*, 51 N. Y. 587.

ILLUSTRATIONS.—A, not having any interest in the land, permits B to use his name as a lessor of the plaintiff in ejectment, on condition that he shall not be at any further expense. B employs an attorney to bring the suit in the name of A, without informing him of the condition annexed to the authority, and A is compelled to pay costs. *Held*, that he has a remedy, not only against B, but against the attorney; although the latter was ignorant of the condition: *Bradt v. Walton*, 8 Johns. 298. A custom of the attorneys of a county to hold themselves responsible for sheriff's fees, in cases wherein they were employed, *held*, not to subject an attorney to liability therefor, in the absence of an express agreement, or of proof that the attorneys were accustomed to pay for such services, regardless of the responsibility of their clients: *Doughty v. Paige*, 48 Iowa, 483.

§ 154. **Liability for Trespass.**—So the attorney is personally liable for trespass where the process is irregular or illegal,¹ and he is liable for procuring or advising a judicial officer to act beyond his jurisdiction.² An attorney who uses the law to enforce his client's demands, however groundless, is not liable so long as he acts merely as attorney, but he is liable when he steps beyond that and actively aids his client's purpose.³ He is liable personally for illegally issuing a *fieri facias*.⁴ He is not liable when he merely communicates to the sheriff his client's instructions to make a levy on property which turns out to belong to another.⁵ Thus where he, obeying his client's instructions, orders the seizure of property, he is not liable to its owner, if such owner is other than the attachment defendant.⁶ Nor is he liable for the trespass of a constable having charge of the execution.⁷ An attorney is not liable for any illegal seizures that may be made under a warrant which he may happen to prepare. But if he also send his clerk to assist in the levy under the warrant, he is liable for any illegal seizure

¹ *People v. Montgomery*, 18 Wend. 633; *Griswold v. Sedgwick*, 6 Cow. 456; *Newberry v. Lee*, 3 Hill, 523.

² *Revill v. Pettit*, 3 McL. (Ky.) 314.

³ *Schalk v. Kingsley*, 42 N. J. L. 32.

⁴ *Newberry v. Lee*, 3 Hill, 523.

⁵ *Ford v. Williams*, 13 N. Y. 577; 67 Am. Dec. 83; *aliter*, if he directs it personally: *Id.*

⁶ *Dawson v. Buford*, 70 Iowa, 127.

⁷ *Seaton v. Cordray, Wright*, 102.

made.¹ So if he specially advises an illegal seizure of property, and assists at the sale, he is liable.² The law is summed up in a recent case thus:³ "An attorney is not liable with his client, in a joint action of trespass, unless it can be shown that he has gone beyond the strict line of his duty. So long as he acts strictly in the execution of the duties of his profession, and does not actually participate in the commission of the trespass, he is not liable. But when he steps beyond that line, and actively aids his client in the execution of his purpose, he is not shielded from responsibility.⁴ While he acts merely in his character of attorney, making use of the process of the law to enforce his client's demand, however groundless and vexatious it may be, he is not amenable to suit.⁵ In the latter case it was conceded that the attorney would have made himself liable if he had done something beyond the mere delivery of the writ; as, by going with the officer to assist in its execution, or giving some direction, independent of that in the writ, to execute it in an unauthorized mode. The distinction is clearly drawn in *Hardy v. Keeler*,⁶ where it is held that an attorney is not liable for any illegal seizure that may be made under a writ issued by him; but where, in addition to issuing the writ, he sent his clerk to assist in the levy thereof, the plea that he is an attorney will not avail as a defense. In this case the attorney employed the workmen, instructed them to commit the wrong complained of, and paid them for it. Under these circumstances, he cannot claim that he was acting in the legitimate sphere of an attorney at law, and is not entitled to immunity." The attorney is not liable for having mistaken his remedy.⁷

¹ *Hardy v. Keeler*, 56 Ill. 152.

Williams, 13 N. Y. 577; 67 Am. Dec.

² *Peckinbaugh v. Quillin*, 12 Neb. 586.

83.

³ *Schalk v. Kingsley*, 42 N. J. L.

⁵ *Oakley v. Davis*, 16 East, 82; *Lowell v. Champion*, 6 Ad. & E. 407.

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⁶ 56 Ill. 152.

⁴ *Hunter v. Burtis*, 10 Wend. 358; *Green v. Elgie*, 5 Q. B. 99; *Ford v.*

⁷ *Poucher v. Blanchard*, 13 Week. Dig. 5.

An attorney of one party to an action referred under a rule of court is liable to an action by the other party for conspiring with one of the arbitrators to obtain an unjust award upon which judgment is entered, although such judgment remains unreversed.¹

§ 155. **Liability for Malicious Prosecution.**—And the attorney is personally liable for maliciously prosecuting a suit he knows to be groundless, and maliciously arresting the defendant thereunder, or attaching his property.² So he is liable for arresting a person on an execution when he knows it to be not authorized by law.³ To render him

¹ *Hoosac Tunnel Dock etc. Co. v. O'Brien*, 137 Mass. 424; 50 Am. Rep. 323.

² *Burnap v. Marsh*, 13 Ill. 535; *Wigg v. Simonton*, 12 Rich. 583; *Wood v. Wier*, 5 B. Mon. 544; *Warfield v. Campbell*, 24 N. Y. 359. The act must be malicious: *Lynch v. Commonwealth*, 16 Serg. & R. 368; 16 Am. Dec. 582; *Hardy v. Keeler*, 56 Ill. 152; *Bicknell v. Dorion*, 16 Pick. 490; *Shaw, C. J.*, saying: "We think, in general, it is true that an action cannot be maintained against an attorney on the ground of his instrumentality in bringing a civil action against the plaintiff, unless where he has commenced such suit without the authority of the party in whose name he sues, or unless there be a conspiracy to bring a groundless suit, knowing and understanding it to be groundless, and without any intent or expectation of maintaining the suit. The former case is precluded here, not only by the whole course of the proof, but by the form of the action. The attorney and client in the action complained of are both made defendants in this suit; of course, therefore, by the plaintiff's own showing the suit was commenced by the attorney upon the retainer, and by the authority of the client. The case of bringing the suit without the authority of the plaintiff in that suit is therefore out of the question. Upon the other ground, I am not prepared to say that if a person applies to an attorney, wishing to have a groundless

suit commenced for the purpose of detaining the property or person of another under the forms of legal process, and the attorney yields to such a request, that they would not render themselves liable to an action at the suit of the party thus injured. It would be very different from the case where the client represents an action to be brought on his responsibility, however groundless the attorney himself may think it to be, and though he explicitly declares to the client that he cannot maintain the action. 'Knowing,' 'believing,' or 'supposing' it groundless are only expressions indicating different degrees of the attorney's belief; the party may have grounds for proceeding not known to the attorney, and he has a right to judge for himself. Take the case put in 1 Mod. 200: The attorney himself drew the release, and therefore knew that the client had no cause of action. He may know that that release was obtained by gross fraud, and therefore no bar to an action. In order, therefore, to charge an attorney upon this ground, it must not only appear that there was an agreement to bring an action which was in fact groundless, and which the attorney supposed to be groundless, but that it was agreed to bring an action understood by both parties to be groundless, and brought as such."

³ *Sullivan v. Jones*, 2 Gray, 570; *Deyo v. Van Valkenberg*, 5 Hill, 242.

liable for a malicious prosecution by his client, it must appear that he knew that the prosecution was both malicious and without cause.¹ He is not personally liable for ordering a levy if he acts *bona fide* and with good cause.² From the mere fact that he acts for the client an attorney is not to be charged with his evil motives and intentions.³

ILLUSTRATIONS.—An attorney procured A's commitment for contempt in not paying certain referee's fees. A court of competent jurisdiction adjudged A to be guilty of the contempt charged, its determination being based upon an erroneous construction of the law. The order of commitment was subsequently reversed by the appellate court. Then A sued the attorney for false imprisonment. *Held*, that the action could not be maintained, the order, though erroneous, being within the jurisdiction of the court making it, and that the attorney was not liable because, before the reversal, he had opposed a motion for A's discharge: *Fischer v. Langbein*, 103 N. Y. 84.

¹ *Peck v. Chouteau*, 91 Mo. 140; 60 Am. Rep. 236.

² *Hunt v. Printup*, 28 Ga. 297.

³ *McKinney v. Curtiss*, 60 Mich. 611.

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CHAPTER XV.

AUTHORITY AND POWERS OF ATTORNEY.

- § 156. Authority evidenced by retainer.
- § 157. Authority to appear presumed.
- § 158. Court may order authority to be produced.
- § 159. Appearance for several persons.
- § 160. Appearance by attorney binds party, though unauthorized.
- § 161. Delegation of authority.
- § 162. Law partnerships.
- § 163. Law clerks.
- § 164. Termination of authority—By dissolution of partnership.
- § 165. Termination of authority—By act of parties.
- § 166. Termination of authority—By termination of suit.
- § 167. Termination of authority—By death.
- § 168. Termination of authority—Other cases.
- § 169. Implied powers of attorneys.
- § 170. Implied powers of attorneys (continued)—Admissions—Affidavits—
Altering securities—Appeal—Arbitration—Arrest—Assignment
—Attachment.
- § 171. Implied powers of attorneys (continued)—Compromise—Continuance
—Contract—Discharge—Discretion—Employing counsel—Error
—Executing bonds—Execution—Guaranty.
- § 172. Implied powers of attorneys (continued)—Judgment—Payment.
- § 173. Implied powers of attorneys (continued)—Process—Purchase—Re-
lease—Sell—Set-off—Sue—Supplementary Proceedings—Waiv-
ers and releases.
- § 174. Extent of authority as to time.
- § 175. Ratification of unauthorized acts.

§ 156. **Authority Evidenced by Retainer.**—The relation of attorney and client is established by the "retainer"; that is, the act of the client by which he engages a lawyer to manage his cause.¹ A written retainer, though

¹ Bouv. Law Dict.; De Wolf v. Strader, 26 Ill. 225; 79 Am. Dec. 371. Blackman v. Webb, 39 Kan. 668, the court saying: "The word 'retainer,' when used in the place where we are now using it, is defined as follows: 'The act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting

it when he is plaintiff, or defending it when he is defendant; the retaining fee'; Bouvier's Law Dict., tit. Retainer. 'The act of employing or engaging an advocate, barrister, attorney, counselor, solicitor, or proctor, to appear and prosecute or defend. The word is also used for the notice served by an attorney, etc., on the opposite

better for both parties,¹ is not essential, a parol retainer being sufficient.² The attorney of the plaintiff controls

party or attorney, that he has been retained, in which use it is by elision for notice of retainer; and for the fee paid to a lawyer upon his undertaking a cause, in which use it is by elision for a retaining fee: Abbott's Law Dict., tit. Retainer. It will be seen that the word 'retainer,' as used in cases of this kind, means, — 1. The act of the client in employing his attorney or counsel; 2. The notice of the retainer served upon the opposite party or his attorney; 3. The retaining fee.

... When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and whether his client may ever call upon him to perform services or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party.

All his skill and ability for that case is at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney; and whether the attorney is ever called upon to perform any services or not, in that case he may, when the case is terminated, recover for whatever the evidence shows the retainer was worth.

Whether he may in any case recover a retaining fee and also an additional amount for his services, we are not now called upon to determine. And neither are we called upon to determine whether he could in any case recover as a retaining fee more than his entire services would be worth if he should devote his services to the entire case, and through all its stages, from the beginning to the end. All that we are now required to determine is, whether he can recover a retaining fee at all, in a case where no such fee was expressly and specifically contracted for, but only a general contract of employment was made. We hold that he can recover." An agent by retaining an attorney for his principal does not create the relation of attorney and client between

himself (the agent) and the attorney: Porter v. Peckham, 44 Cal. 204.

¹ In *Owen v. Ord*, 3 Car. & P. 349, Lord Tenterden, C. J., said "that a formal written retainer is better for the attorney because it gets rid of all difficulty about proving his retainer, and it would also be better for some clients, as it would put them on their guard and prevent them from being drawn into lawsuits without their express direction." See *McAlexander v. Wright*, 3 T. B. Mon. 189; 16 Am. Dec. 93.

² *Manchester Bank v. Fellows*, 28 N. H. 302; *Hardin v. Ho-Yo-Po-Nubby*, 27 Miss. 567; *Hirshfield v. Landman*, 3 E. D. Smith, 238. In *Hardin v. Ho-Yo-Po-Nubby*, the court say: "An attorney is an officer of court, and responsible to the court for the propriety of his professional conduct, and the proper use of the privileges he has as such. No warrant of attorney is required by our laws or practice to enable him to appear for and to represent a party in court. He is permitted, by almost universal practice in this country, to do so under verbal retainer, and it is only in cases of clear want of authority, or abuse of his privilege, that he is held to be incompetent to institute a suit or to represent a party in court. The presumption is in favor of his authority, and though he may be required to show it, yet if he acts in good faith, and the want of authority is not manifest, he will not be held to have acted without authority, because it is not shown according to strictly legal rules. If this were not so, the greatest inconvenience in practice would continually occur, both to clients and attorneys; for suits are frequently instituted by attorneys, under the authority of letters from their clients, who are strangers, and whose handwriting is unknown to them, and could not be proved without great trouble and delay. If required, in such a case, to produce his authority, the production of the letter, though he might be unable to prove the handwriting, would be sufficient; and so of a letter written by a party purporting to be the agent

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the prosecution of the action as against the defendant, and the court will deny a motion to dismiss it, founded on a written consent of the plaintiff personally, if the attorney for the plaintiff refuses his consent. If the defendant has obtained any right to have the action dismissed, he should set it up by pleading, as a defense.¹ If a party who has an undivided interest in a tract of land, which is the subject of a partition suit, employs an attorney to act for him in relation to his interest therein, the relation of attorney and client does not exist between the employer and attorney, as to the interest of the party for whom the employer acted as agent.² An authority may be implied as well as shown by proof of an express retainer.³ When an attorney is employed by a party, the law implies a contract between them; and before a new partner of such attorney can be made a party to the contract, there must be some agreement or understanding to place the latter in a position which would entitle him to make a claim against the client who did not originally employ him.⁴ The authority of the attorney to appear may be inferred from circumstances; as, that he was the general attorney of the defendant, and the defendant though knowing of it did not object to his appearance.⁵ It is in the discretion of the court to hear an attorney as *amicus curiæ*, concerning a proceeding in which he is not counsel.⁶ An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before

of the plaintiff. All that is required to be shown in such cases, in the first instance, is, that the attorney has acted in good faith, and under an authority, appearing to be genuine, though informal. It then devolves upon the party impeaching the authority to show by positive proof that it is invalid and insufficient in substance."

¹ *McConnell v. Brown*, 40 Ind. 384.

² *Porter v. Peckham*, 44 Cal. 204.

³ *Tally v. Reynolds*, 1 Ark. 99; 31 Am. Dec. 737; *Rogers v. Park*, 4

Humph. 480. *Held*, insufficient in *Day v. Adams*, 63 N. C. 254. One who has contracted to act as attorney for a partnership cannot claim to be employed by it in a contest among the beneficiaries of a trust, in which contest the firm is incidentally involved in the capacity of trustee: *Cutcheon v. Loud*, Mich. (1888).

⁴ *Davis v. Peck*, 54 Barb. 423.

⁵ *Bogardus v. Livingston*, 2 Hilt. 236.

⁶ *State v. Jefferson Iron Co.*, 60 Tex.

312.

it. He has no control over the suit, and no right to institute any proceeding therein, or to bring the case from one court to another, or from a single judge to the full court, by exceptions, appeal, or writ of error.¹

ILLUSTRATIONS. — B, being indebted to A, mortgaged a tract of land to him as security. C, a creditor of B, obtained judgment against him, which was levied on the mortgaged premises, and purchased by C. A obtained a rule on C to show cause why an injunction to stay waste should not be granted, and why service of the subpoena upon the attorney of C, who was the plaintiff at law, in an action against A for slandering the title of C to the land, should not be considered as service on C. *Held*, that the two actions were wholly unconnected, and the attorney of C could not be considered as representing him in the latter suit: *Hitner v. Suckly*, 2 Wash. C. C. 465.

§ 157. Authority of Attorney to Appear Presumed. —

Where an attorney appears for a person, his authority to do so is presumed,² both in the trial and in the appellate court.³ An attorney appearing for an infant will be presumed to have been authorized by his next friend.⁴ The right of an attorney of record to control and manage the action cannot be questioned by the opposite party while he remains such attorney.⁵ A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard

¹ *Martin v. Tapley*, 119 Mass. 116.

² *Brown v. Nichols*, 42 N. Y. 30; *Hamilton v. Wright*, 37 N. Y. 502; *Jackson v. Stewart*, 6 Johns. 34; *Osborn v. Bank*, 9 Wheat. 738; *Clark v. Willett*, 35 Cal. 540; *Lawson on Presumptive Evidence*, 50, 52; *Cartwell v. Menifee*, 2 Ark. 356; *Lester v. Watkins*, 41 Miss. 647; *Weeks on Attorneys*, sec. 196; *Hill v. Mendenhall*, 21 Wall. 453; *Martin v. Walker*, 1 Abb. Adm. 579; *Turner v. Caruthers*, 17 Cal. 431; *Silkman v. Boiger*, 4 E. D. Smith, 236; *Henck v. Todhunter*, 7 Har. & J. 275; 16 Am. Dec. 301; *Manchester Bank v. Fellows*, 28 N. H. 302; *Bridgton v. Bennett*, 23 Me. 420; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; 33

Am. Dec. 656; *Field v. Proprietors*, 1 Cush. 11; *Gaul v. Groat*, 1 Cow. 113; *Tally v. Reynolds*, 1 Ark. 99; 31 Am. Dec. 737; *Leslie v. Fischer*, 62 Ill. 118; *Rogers v. Park*, 4 Tiumph. 480; *Bunton v. Lyford*, 37 N. H. 512; 75 Am. Dec. 144; *Harshey v. Blackmarr*, 20 Iowa, 161; 80 Am. Dec. 520; *Norberg v. Heineman*, 59 Mich. 210; *Schlitz v. Meyer*, 61 Wis. 418.

³ *Ricketson v. Compton*, 23 Cal. 637; *Frost v. Lawler*, 34 Mich. 235; *Noble v. Bank of Kentucky*, 3 A. K. Mar. h. 203; *Shroudenbeck v. Phoenix Fire Ins. Co.*, 15 Wis. 632.

⁴ *Hilliard v. Carr*, 6 Ala. 557.

⁵ *Commissioners v. Younger*, 29 Cal. 147; 87 Am. Dec. 164.

through him, and cannot himself assume control of the case.¹

§ 158. Court may Order Authority to be Produced. —

But the attorney may be compelled by the court to show his authority to appear for a party whom he pretends to be authorized to represent, and this may be required at the instance of the opposite party as well as of the party for whom he appears.² To invoke, however, this power, the opposite party must show facts tending to prove that the attorney had no such authority.³ An affidavit that the affiant is informed and believes that the attorney is not authorized is insufficient.⁴ Where a party denies, under oath, that a plea filed in his name by an attorney was filed with his authority, and the allegation is borne out by the proof, the act of the attorney is not binding.⁵ In Kentucky, the adverse party can demand the attorney's authority only where he shows his rights are jeopardized without it, or that he was disturbed by being brought into litigation without the consent of the other party.⁶ One cannot

¹ Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164.

² People v. Mariposa County, 39 Cal. 683; Commissioner v. Purdy, 36 Barb. 266; Rogers v. Park, 4 Humph. 480; West v. Houston, 3 Harr. (Del.) 15; Stillman v. Boiger, 4 E. D. Smith, 236; Knowlton v. Plantation, 14 Me. 20; Clark v. Willett, 35 Cal. 534; King of Spain v. Oliver, 2 Wash. C. C. 429; Standifer v. Dowlen, Hemp. 209; Ex parte Gillespie, 3 Yerg. 325. Where an attorney sues out a writ of error without the sanction of the plaintiff named in the writ, the same will be dismissed on motion at the attorney's cost: Anonymous, 11 Ill. 488; Frye v. Calhoun County, 14 Ill. 132; Powell v. Spaulding, 3 G. Greene, 443; Bell v. Usury, 4 Litt. 334; Critchfield v. Porter, 3 Ohio, 518. When a person who has not been admitted to practice as an attorney is employed to prosecute or defend a suit, he must, if his authority is questioned, produce

and file it with the clerk: Stevens v. Fuller, 55 N. H. 443.

³ People v. Mariposa County, 39 Cal. 683; McKiernan v. Patrick, 4 How. (Miss.) 333; Ninety-nine Plaintiffs v. Vanderbilt, 4 Duer, 632; Thomas v. Steele, 22 Wis. 267; Turner v. Caruthers, 17 Cal. 421; Penobscot Corp. v. Lamson, 16 Me. 224; 33 Am. Dec. 656; Bridgton v. Bennett, 23 Me. 420; Manchester Bank v. Fellows, 28 N. H. 512; Allen v. Green, 1 Bail. 448; Tally v. Reynolds, 1 Ark. 99; 31 Am. Dec. 737; Belt v. Wilson, 6 J. J. Marsh. 495; 22 Am. Dec. 88.

⁴ People v. Mariposa County, 39 Cal. 683; Cartwell v. Menifee, 2 Ark. 356. As to what was considered sufficient authority, see Savery v. Savery, 8 Iowa, 217; Bush v. Miller, 13 Barb. 481; Hughes v. Osborn, 42 Ind. 450; Grignon v. Schmitz, 18 Wis. 620.

⁵ Decuir v. Lejeune, 15 La. Ann. 569.

⁶ McAlexander v. Wright, 3 T. B. Mon. 194.

prove his authority to appear as attorney for a party in a suit before a justice, by producing a letter from a third person asking him to appear; nor will the fact that a third person is himself a lawyer be sufficient to give authority, if it does not distinctly appear that he is attorney for the party.¹ If an attorney, who is ruled to produce his authority to bring a suit, files the affidavit of the plaintiff's agent that he was directed by the plaintiff to cause suit to be brought, and that he employed said attorney in pursuance of such direction, the showing of authority is sufficient.² If not objected to in the lower it cannot be inquired into in the appellate court.³ An objection to the right of counsel to appear in defense of an action cannot be made after the term at which the appearance is first made.⁴ A motion for a rule on the plaintiff to file his warrant of attorney must be made before plea.⁵

ILLUSTRATIONS.—On a rule for an attorney to show his authority to prosecute a suit, on affidavit of defendant that he believed the attorney had not communicated directly with plaintiff by letter, and that the authority was derived from some person or persons who had not sufficient authority from plaintiff, who, defendant believed, did not know of the suit, *held*, not sufficient to show want of authority: *Low v. Settle*, 22 W. Va. 387. A party addressed a letter to his wife, saying, "I would rather give what I am worth to some honest person, as to suffer the defendant to have one dollar. So as you have employed lawyer N. to assist you, I hope you will obtain justice; you are doing just what I intended doing"; and afterwards wrote to his brother in regard to the case, "Go on with it, and do the best you can": *Held*, that there was no authority given to the wife or brother, as agent, to employ an attorney, and that the letters were not a sufficient compliance with the act requiring an attorney in a cause to file a power of attorney to act for the party: *Day v. Adams*, 63 N. C. 254. In

¹ *Westbrook v. Blood*, 50 Mich. 443. A. K. Marsh. 263; *Shroudenbeck v. Insurance Co.*, 15 Wis. 632.

² *Hughes v. Osborn*, 42 Ind. 450.

³ *State v. Carothers*, 1 G. Greene, 464; *Dunman v. Hartwell*, 9 Tex. 495; *Knowlton v. Plantation No. 4*, 14

60 Am. Dec. 176; *Noble v. Bank*, 3 Mc. 20. *Mercier v. Mercier*, 2 Dall. 142; *Sutton v. Cole*, 3 Pick. 232.

an action on a promissory note, the defendant obtained a rule on the attorney of the plaintiff to show the authority under which he appeared to prosecute the action, which rule was based upon an affidavit alleging that the plaintiff (the indorsee) and the payee of the note resided in Rome, in the state of New York; that the plaintiff, some time in the year 1855, told the affiant that the payee of the note had simply transferred to him the note sued on, as collateral security, and upon the express understanding and condition between them that he should not bring suit on the same against the defendant; the attorney answered the rule under oath, stating that in July, 1855, he received a letter from D. and L., of Rome, New York, whom he believed to be the attorneys at law of that place, inclosing the note sued on, stating that the note was the property of the plaintiff, and instructing him to put it at once in process of collection, which showing the court held sufficient: *Held*, the affidavit filed on the part of defendant did not make out a *prima facie* case, that the court might well have refused the rule in the first instance, and that the showing made by the attorney was sufficient: *Savery v. Savery*, 8 Iowa, 217.

§ 159. **Appearance for Several Persons.**—Where a counsel appears expressly for certain defendants, his signature to papers in the cause subsequently as “attorney for defendants” will be construed as limited to those for whom he expressly appeared.¹ Where several defendants appear, each by his own attorney, the attorney of one cannot give or accept notices for the others.² An appearance in a suit where there are several defendants, for the defendants generally, is *prima facie* an appearance for all.³ The entry of an appearance by an attorney for the defendants in an action against a partnership will be construed as an appearance for them as partners, and not for them individually.⁴ One co-defendant may employ an attorney for the other co-defendants, and his appearance for all will bind all.⁵

¹ Spanagel v. Dellinger, 42 Cal. 148.

⁴ Phelps v. Brewer, 9 Cush. 390; 57

² Hobbs v. Duff, 43 Cal. 485.

Am. Dec. 56.

³ Kenyon v. Schreck, 52 Ill. 382;
American Ins. Co. v. Oakley, 9 Paige,

⁵ Abbott v. Dutton, 44 Vt. 546; 8
Am. Rep. 394.

496; 38 Am. Dec. 561.

ILLUSTRATIONS.—Plaintiff's attorney entered the suit to the use of a third person. *Held*, on defendant's objection, that the authority of the attorney would be presumed: *Hager v. Cochran*, 66 Md. 253.

§ 160. **Appearance by Attorney Binds Party though Unauthorized.**—In general, an appearance by an attorney binds the party for whom he appears, whether the attorney was employed by him or not.¹ The remedy is against the attorney,² though upon direct application to the court relief will be granted to the party.³ He must make application at once,⁴ and in the same suit in which the unauthorized appearance was made.⁵ A person in

¹ *St. Albans v. Bush*, 4 Vt. 58; 23 Am. Dec. 246; *Spaulding v. Swift*, 18 Vt. 214; *Newcomb v. Peck*, 17 Vt. 302; *Abbott v. Dutton*, 44 Vt. 546; 8 Am. Rep. 394; *Ferguson v. Crawford*, 7 Hun, 25; *Bunton v. Lyford*, 37 N. H. 512; 75 Am. Dec. 144; and see note to this case in 75 Am. Dec. 146-151. In *Hamilton v. Wright*, 37 N. Y. 502, it is said: "Receiving their authority from the court, they are deemed its officers. Their commissions declare them entitled to confidence, and in a just sense their license is an assurance not only of their competency, but of their character and title to confidence. The direct control of the courts over them as officers, by way of summary discipline and punishment, to compel the performance of their duty, or to suspend or degrade them, is retained and exercised as a guaranty of their fidelity. It is no denial of the rule that where there are special circumstances calling for its relaxation, the courts may and do relieve from its rigid application. The exception arising from such special circumstances strengthens, as well as recognizes, the rule itself. Hence, when an appearance is entered by an attorney without an authority, the inquiry whether such attorney is of sufficient responsibility to answer for his unauthorized conduct to the party injured thereby, is entertained. And it may be proper always to inquire whether the injury to the party is irremediable, unless such appearance

be set aside, and the proceedings founded thereon vacated. In exercise of their general equitable control over their own judgments, the court may and should consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party who has in good faith relied upon such appearance, and the official character of the attorney who appears."

² *Cyphert v. McClune*, 22 Pa. St. 195; *Spaulding v. Swift*, 18 Vt. 214; *Governor v. Lassiter*, 83 N. C. 38; *Bunton v. Lyford*, 37 N. H. 512; 75 Am. Dec. 144.

³ *Ellsworth v. Campbell*, 31 Barb. 135; *Denton v. Noyes*, 6 Johns. 298; 5 Am. Dec. 237; *Decur v. Le Jeune*, 15 La. Ann. 569.

⁴ *Cyphert v. McClune*, 22 Pa. St. 195.

⁵ *Abbott v. Dutton*, 44 Vt. 546; 8 Am. Rep. 394. In *Brown v. Nichols*, 42 N. Y. 30, *Ingalls, J.*, says: "The law, as settled in this state, rests upon principle as well as authority. The attorney is an officer of the court acting under oath, and liable to be disgraced and punished for such gross violation of duty as to fraudulently appear in an action without authority; and I apprehend the instances are rare indeed when it has occurred. Again, a contrary rule would, it seems to me, be impracticable, as the title to real property depends to a great extent upon the records of the courts; it would be a great hardship to compel

whose name an attorney has prosecuted an unauthorized and unsuccessful ejectment suit is liable to the defendant for the costs.¹ A judgment obtained upon the unauthorized appearance of an attorney cannot be attacked collaterally.²

§ 161. **Delegation of Authority.**—The attorney has no authority to delegate his powers to others; i. e., to employ a substitute;³ for the relation of attorney and client is one of trust and confidence, and implies a personal execution of the duties which it confers.⁴ He cannot delegate his authority to make a collection to another attorney, so that the client will be liable for costs incurred in the attempt to collect;⁵ therefore, the attorney has no implied authority to employ associate or assistant counsel,⁶ unless the case requires it, and the client is absent and

parties in tracing titles acquired through such records, in every instance where a judgment has been entered, to inquire into the particular authority which an attorney had to appear in such actions. Indeed, the effect of such a rule would be to create positive distrust as to the soundness and regularity of such titles. I think the objections on the grounds of hardship and danger urged against upholding such appearance by an attorney rest more in theory than practice. If a party will omit to apply to the court for relief against an unauthorized appearance of an attorney, he should not be allowed to attack proceedings collaterally upon such ground."

¹ *Hamilton v. Wright*, 37 N. Y. 502.

² *Brown v. Nichols*, 42 N. Y. 30.

³ *Weeks on Attorneys*, sec. 246; *In re Bleakley*, 5 Paige, 311; *Johnson v. Cunningham*, 1 Ala. 249; *Ratcliff v. Baird*, 14 Tex. 43; *Kellogg v. Norris*, 10 Ark. 18; *Dickson v. Wright*, 52 Miss. 585; 24 Am. Rep. 677; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Danley v. Crawl*, 28 Ark. 95.

⁴ *Hitchcock v. McGehee*, 7 Port. 556; *Kellogg v. Norris*, 10 Ark. 18; *Pollard v. Rowland*, 2 Blackf. 22; *Cornelius*

v. Wash, Brees, 98; 12 Am. Dec. 145. An attorney may employ an agent to receive money for him in his professional business, and his acts will bind the client: *McEwen v. Mazyck*, 3 Rich. 210.

⁵ *Antrobus v. Sherman*, 65 Iowa, 230; 54 Am. Rep. 7.

⁶ *Paddock v. Colby*, 18 Vt. 485; *Gillespie's Case*, 3 Yerg. 325. An attorney has no right to retain another attorney at the client's expense; and that the client sees such latter attorney in court assisting in the trial, and does not object, does not render the client liable: *Young v. Crawford*, 23 Mo. App. 432. An attorney cannot recover from his client fees of associate counsel without proving that, at his client's request, he has either paid or become responsible therefor: *Cook v. Risher*, 4 E. D. Smith, 253. Where an attorney enters into a contract with a client to prosecute an action to final judgment for a stipulated sum, and such attorney employs a second one to assist him in the case, the client will not be liable for fees for such second attorney unless he in some manner requests his employment or retention in the case: *Sedgwick v. Bliss*, Neb. Sup. Ct., 1888.

cannot be consulted;¹ or the client knows of the substitution and accepts the services;² or the attorney, having prepared the case, is taken sick, and employs a substitute to argue it.³ An attorney is not authorized merely by virtue of the intrusting to him, by a client, of a note for collection, without special instructions to delegate to another the right to receive payment of such claim; and if the debtor make payment of the note to an agent of the attorney, known to him to be such, and who has not at the time the note or other evidence of indebtedness in possession, such payment is no defense as against the owner of the note.⁴ The wife of an attorney has no authority to receive payments of claims put into his hands for collection.⁵ By the death of the attorney the powers of his substitute cease.⁶ An agreement by one lawyer to turn over to another notes which he has in his hands for collection cannot be enforced.⁷

ILLUSTRATIONS. — An attorney who received a note for collection sent it to another attorney, who collected the amount and failed to pay it over. *Held*, that the first attorney had no right of action in his own name against the second, unless he could show some special property or lien in or upon the amount, as a claim for commissions, or an indorsement of the note in blank for collection: *Herron v. Bullitt*, 3 Sneed, 497. One attorney confided a note to another for collection, and took his receipt therefor, but without giving instructions with respect to the ownership. After the money was collected, it was remitted to the payee of the note, whose name, however, was indorsed on the note. *Held*, that this remittance (the payee not being the owner) did not discharge the collecting attorney from liability to his immediate principal; and that the action of the latter for the money would not be defeated by proof that he was him-

¹ *Briggs v. Georgia*, 10 Vt. 68.

² *Smith v. Lipscomb*, 13 Tex. 532.

An attorney employed to defend a suit, who is compelled by circumstances to engage a substitute to perform the duty, may maintain an action for the whole services rendered. The client, if dissatisfied with the substitution, should tender compensation for the services already rendered, and re-

scind the contract: *Fenno v. English*, 22 Ark. 170.

³ *Rust v. Larue*, 4 Litt. 412; 14 Am. Dec. 172.

⁴ *Dickson v. Wright*, 52 Miss. 585; 24 Am. Rep. 677.

⁵ *Day v. Boyd*, 6 Heisk. 458.

⁶ *Peries v. Aycina*, 3 Watts & S. 64.

⁷ *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267.

self the agent of the indorsee, unless the indorsee had asserted his right to the money as against his agent: *Lewis v. Peek*, 10 Ala. 142. Defendants residing in New York, and having a claim against O., who lived in Nebraska, gave it to a law and collecting agency in New York, with instructions to collect. The claim was forwarded by the agency to attorneys in Nebraska, who obtained judgment by confession, and, upon execution issued thereon, a portion of the judgment was collected; this was forwarded to the agency in New York, but no part was paid over to defendants, and they were ignorant of the collection. At the time the judgment was obtained, O. was insolvent, and this was known to said attorneys. In an action by the assignee in bankruptcy of O, *held*, that there was no relation of attorney and client between defendants and the attorneys in Nebraska, and as they neither authorized any act violative of the bankrupt act, nor ratified it, they were not responsible therefor, and plaintiff was not entitled to recover: *Hoover v. Greenbaum*, 61 N. Y. 305. An attorney residing in a particular county brought an action in the district court of another county, and after the filing of the petition wrote to a firm of attorneys in the county where the action was brought, requesting them to file the proper pleadings to make up the issues and informed them that to enable them to do so his client would call upon them to state necessary facts, and saying: "I will see you paid for your trouble." The client thereupon called upon the attorneys a number of times, and they filed the necessary papers to make up the issues, and assisted in the trial of the case, and in procuring a decree for the client, nothing being said by her to them about the contract made by her with the attorney who filed the petition, and they had no knowledge of such contract. *Held*, that the client was liable for the fees of the attorneys employed to assist in the case: *Sedgwick v. Bliss*, Neb. Sup. Ct., 1888.

§ 162. **Law Partnerships.**—A law partnership does not confer on each member of the firm the ordinary and extensive powers of mercantile partners.¹ A person re-

¹ Weeks on Attorneys, sec. 244. An action was brought against a firm of attorneys on a note given by one of them for a firm debt. *Held*, that the burden was on the plaintiff to prove that the other partner had authorized the giving of the note, or that it was necessary to the carrying on of the firm business, or that it was usual in similar partnerships: *Smith v. Sloan*,

37 Wis. 285; 19 Am. Rep. 757. "We gather from all the authorities," said the court, "that the distinction between a trading and a non-trading partnership, in respect to the power of a partner to bind his copartner by negotiable instruments, is not limited to a mere presumption of such authority in one case and the absence of such presumption in the other, as the

taining a firm of lawyers is entitled to their joint services, and none of them can leave his service and go on the other side of the case.¹ One member of the firm may sue for a demand due the firm,² but there may be a set-off against the firm.³ While a client is entitled to the personal services of the attorney he retains, yet if he retains a firm, either member can perform the service; and if it is performed with the client's assent by a person in their employ, the client cannot resist paying a fair compensation on the ground that it was not personally rendered.⁴ If attorneys, who are copartners, accept a retainer, it is a joint contract, continuing to the termination of the suit, and neither can be released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of their firm, or any other act or agreement between themselves.⁵ An attorney cannot bind his partner by a promise to indemnify an officer for committing one to jail; but the partnership may warrant the inference that he acted for both, and a subsequent ratification by the partner binds him.⁶ One member of the firm receiving notes for collection is responsible for the acts of another who attends to the collecting,⁷ and one partner is liable for the negligence and unskillfulness of the other.⁸

learned counsel for the plaintiff argued; but we think, and must so hold, that one partner in a non-trading partnership cannot bind his copartner by a bill or note drawn, accepted, or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and that the burden is upon the holder of the note who sues upon it to prove such authority, necessity, or usage. It may be proper to remark in this connection, by way of illustration, that it is probably a usual practice for one party in a firm of attorneys to draw bills in the firm name upon clients for services and disbursements; also checks upon banks for

partnership funds; and perhaps, also, to transfer notes belonging to the firm by indorsement. In actions involving questions of the validity of such bills, checks, or indorsements as against the other partners, the party asserting their validity would be bound to establish it in the manner above indicated."

¹ Id.; *Walker v. Goodrich*, 16 Ill. 341; *Morgan v. Roberts*, 38 Ill. 65.

² *Platt v. Hulen*, 23 Wend. 456.

³ *Platt v. Hulen*, 23 Wend. 456.

⁴ *Eggleston v. Boardman*, 37 Mich. 14.

⁵ *Walker v. Goodrich*, 16 Ill. 341; *S. P., Morgan v. Roberts*, 38 Ill. 65.

⁶ *Marsh v. Gold*, 2 Pick. 285.

⁷ *Mardis v. Shackelford*, 4 Ala. 493; *Dwight v. Simon*, 4 La. Ann. 490; *Poole v. Gist*, 4 McCord, 259.

⁸ *Warner v. Griswold*, 8 Wend. 665; *Livingston v. Cox*, 6 Pa. St. 360.

ILLUSTRATIONS.—A, an attorney at law associated with B, received from C a demand for collection. A retired from practice and left the claim with B, who became copartner with D; and B and D brought suit and recovered judgment on the demand, and the sheriff collected the money on execution, and paid it over to D. *Held*, in an action by C against A to recover the money collected on execution, that the sheriff was justified in paying the money to D, and that A was liable therefor: *Wilkinson v. Griswold*, 12 Smedes & M. 669. A law firm was employed to assist in the prosecution of a suit in the state court, and the fee was contingent on success; the plaintiff, without consent of his counsel, dismissed his suit before trial, paid his attorneys for their services up to date, and employed one of them, after the dissolution of the partnership, to bring suit in the circuit court of the United States for the same purpose. *Held*, that this was a separate and distinct suit, and the old firm was not entitled to any of the fees earned in the new suit: *Tomlinson v. Polsley*, W. Va., 1888.

§ 163. Law Clerks.—A clerk may represent the lawyer in the ordinary business of the office,¹ but, unlike a partner, he is not prohibited from commencing business himself, and acting against his master's former clients.² But the clerk has no authority to discontinue an action,³ nor bind a client by a discharge without satisfaction.⁴

§ 164. Termination of Authority—By Dissolution of Partnership.—A dissolution of a partnership existing between attorneys does not affect engagements already made.⁵ In the absence of any showing to the contrary, a law firm will be presumed to have completed its contract of retainer even after dissolution. But the new firm, although succeeding to the old one, cannot recover on the original contract.⁶ The liability of each member of a partnership of attorneys to collect money recovered by judgment continues after the dissolution of the partner-

¹ *Power v. Kent*, 1 Cow. 211; *Cooper v. Carr*, 8 John. 360; *Jackson v. Yale*, 1 Cow. 213; *Birkbeck v. Stafford*, 14 Abb. Pr. 285.

² *Breben v. Thorp*, 1 Jacob, 300; *Corning v. Cooper*, 7 Paige, 587.

³ *Irvine v. Spring*, 7 Robt. (N. Y.) 293.

⁴ *Carter v. Talcott*, 10 Vt. 471.

⁵ *Weeks on Attorneys*, sec. 191;

Walker v. Goodrich, 16 Ill. 241.

⁶ *Moshier v. Kitchell*, 87 Ill. 18.

ship, notwithstanding such dissolution may have taken place before the business intrusted to them was completed, and the only way that such liability can be released is by notice of the dissolution. In the absence of such notice, as the client intrusted his business to the firm, he has a right to look to each member thereof for its faithful performance.¹

§ 165. Termination of Authority—By Act of Parties.—

The client may determine the authority by expressly revoking it,² but not without first paying his charges,³ and as to third parties, not without notice to them.⁴ A party has a general right to change his attorney, and will always be allowed to do so where the attorney has in his

¹ *Smyth v. Harvie*, 31 Ill. 62; 83 Am. Dec. 202.

² *Bathgate v. Haskin*, 59 N. Y. 533; *Langdon v. Castleton*, 30 Vt. 285; *Hazlett v. Gill*, 5 Robt. 611; *Wells v. Hatch*, 43 N. H. 246; *Ogden v. Devlin*, 45 N. Y. Sup. Ct. 631; *Eliot v. Lawton*, 7 Allen, 274; 83 Am. Dec. 683. An attorney cannot defend his client's suit without his consent, and such consent may be withdrawn at any time. It is immaterial that the interests of another client of the attorney requires that the suit should be defended: *Yoakley v. Hawley*, 5 Lea, 670.

³ *Weeks on Attorneys*, sec. 248; *Board v. Brodhead*, 44 How. Pr. 441; *Parker v. Williamsburgh*, 13 How. Pr. 250; *Hoffman v. Van Nostrand*, 14 Abb. Pr. 336; *Wilkinson v. Tilden*, 14 Fed. Rep. 778; *Greenfield v. New York*, 28 Hun, 320; *Carver v. United States*, 7 Ct. of Cl. 499. Plaintiff's attorney may continue suit against defendant to recover amount of his fee after plaintiff has dismissed: *Jones v. Morgan*, 39 Ga. 310; 99 Am. Dec. 458.

⁴ *Comfort v. Stockbridge*, 38 Mich. 342. Payment of judgment or decree to an attorney of record, who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on

the plaintiff, so far, at least, as the defendant is concerned: *Yoakum v. Tilden*, 3 W. Va. 167; 100 Am. Dec. 738; *Lewis v. Sumner*, 13 Met. 269; *Shaw, C. J.*, saying: "Nothing is more important in a litigation in court than for a party to know who is his adversary's accredited agent, and with whom he may safely deal in that capacity. Hence, the great need in all courts of setting apart officers recognized as attorneys, and determining their qualifications, rights, and powers. When, therefore, an appearance is entered for a party by a regular attorney, all parties have a right *prima facie* to regard him as the accredited representative of such party. It would be a great misdemeanor in an attorney rendering him liable to censure and punishment, as well as to an action for damages in a proper case, if he were to enter an appearance without an authority: *Smith v. Bowditch*, 7 Pick. 137; *Field v. Gibbs*, Pet. C. C. 158. It follows from this, that when once an attorney has been recognized as the representative of a party on the record, he shall be presumed so to continue until his authority is revoked, and his appearance withdrawn and due notice thereof given; and the court of common pleas and this court have rules prohibiting the change of attorneys without notice."

hands security for his charges and disbursements.¹ But if the attorney has been unfaithful to his trust, he may be ordered to deliver up such securities.² A client cannot substitute in an action one attorney for another, without showing some reason other than his mere will to make a change, except on payment of the costs and counsel fees earned. The attorney is not bound to consent to a substitution, or to deliver the papers on which he has a lien, until the amount of his just demands is ascertained by the court or a referee, and paid to him.³ An attorney once admitted to represent a party cannot be discharged unless with the consent of the court until the suit is ended. While his name continues on the record, the adverse party has the right to treat him as the authorized attorney, and a service of notice on him is as valid as if served on the party himself.⁴ The attorney may terminate the relation by withdrawing from the suit at any stage of the proceedings,⁵ but he is as a rule bound to

¹ *In re Paschal*, 10 Wall. 483; *Munford v. Murray*, Hopk. 369.

² *Sloo v. Law*, 4 Blatchf. 268.

³ *Supervisors v. Brodhead*, 44 How. Pr. 411; compare *Supervisors v. Brodhead*, 44 How. Pr. 426.

⁴ *Walton v. Sugg*, Phill. 98; 93 Am. Dec. 580.

⁵ *In Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263, 48 N. Y. Sup. Ct. 11, the employment of counsel by the client with whom the attorney could not cordially co-operate, for personal reasons, was held a good ground for the attorney's withdrawal, and that he might recover for the services already rendered. Said the court: "The rule of law undoubtedly is, as claimed by the defendant, that an attorney who is retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination, and that he cannot abandon the service of his client without justifiable cause and reasonable notice. This rule has been laid down in many authorities: *Menzies v. Rodrigues*, 1 Price, 92; *Stokes v. Trumper*, 2 Kay

& J. 232; *Creswell v. Byron*, 14 Ves. 272; *Nicholls v. Wilson*, 2 Dowl., N. S., 1032; *Harris v. Osbourn*, 2 Car. & M. 629; *Whitehead v. Lord*, 11 Eng. L. & Eq. 589; *Davis v. Smith*, 48 Vt. 54; *Bathgate v. Haskin*, 59 N. Y. 535; 2 Greenl. Ev., sec. 142; *Weeks on Attorneys*, secs. 235, 316; *Cordery on Law of Solicitors*, 62. If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered. The contract being entire, he must perform it entirely, in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation. While the attorney is thus bound to entire performance, and the contract as to him is treated as an entire contract, it is a singular feature of the law that it should not be treated as an entire contract upon the other side; for it is held that a client may

give reasonable notice,¹ though Parke, B., in one case said: "There might be instances where he would be at liberty to do so without notice, because a case might occur so plain as not to require notice."² An attorney is not justified in withdrawing from a case merely because his client refuses to pay some demand pertaining to another proceeding.³ An attorney who refuses to go on with his client's case because the client fails to furnish money must be deemed to assent to the substitution of another attorney; and it is within the discretion of the court to determine upon what terms the substitution shall be made, and as to whether the judgment, when obtained, shall be chargeable with the fees of the attorney first employed.⁴ The Mich-

discharge his attorney, arbitrarily, without any cause at any time, and be liable to pay him only for the services which he has rendered up to the time of his discharge: *Ogden v. Devlin*, 45 N. Y. Sup. Ct. 631; *Trust v. Repoor*, 15 How. Pr. 570; *Gustine v. Stoddard*, 23 Hun, 99. What shall be a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and cannot be. If the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money during the progress of a long litigation to his attorney to apply upon his compensation, sufficient cause may thus be furnished to justify the attorney in withdrawing from the service of his client. So any conduct on the part of the client, during the progress of the litigation, which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses or any other unjustifiable means, would furnish sufficient cause. The attorney is always interested to know with whom he is to be associated in the trial of a cause. The counsel is supposed to be his superior, and is usually employed on account of his superior ability, experience, reputation, or professional standing; and after an attorney has engaged in a cause, it would seem

to be quite proper that he should be consulted as to the person who is to bear the important relation to him of counsel. The client would certainly have no right, against the protest of the attorney, to introduce as counsel in the case a person of bad character, or of much inferior standing and learning,—one not capable of giving discreet or able advice. It would humiliate an attorney to sit down to the trial of a cause, and see his case ruined by the mismanagement of counsel. The relations between attorney and counsel, too, are of a delicate and confidential nature. They should have faith in each other, and their relations should be such that they can cordially co-operate. While a client has the undoubted right to employ any counsel he chooses, yet it is fair and proper, and professional etiquette requires, that he should consult the attorney, and other counsel in the case, so that they can withdraw, if, for any reason, they do not desire to be associated with them."

¹ *Bathgate v. Haskin*, 59 N. Y. 533; *Hoby v. Built*, 3 Barn. & Adol. 350; *Love v. Hall*, 3 Yerg. 408.

² *Nicholls v. Wilson*, 11 Mees. & W. 107.

³ *Cairo etc. R. R. Co. v. Koerner*, 3 Ill. App. 248.

⁴ *In re H.*, 93 N. Y. 381.

igan statute providing for a stay of proceedings in the cause, for the appointment by the client of another attorney or solicitor in case "any attorney or solicitor shall die, be removed, or suspended, or cease to act as such," does not apply to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice, but is intended to provide for those cases only in which the attorney or solicitor, by reason of death, disability, or other cause, has ceased to practice in the court.¹

ILLUSTRATIONS.—An attorney, receiving a claim for collection, stated in his receipt therefor that the money, when collected, was to be paid to a third person. *Held*, this was merely an authority to the attorney to dispose of the proceeds of the claim in that manner, and such authority could at any time be revoked: *Swartz v. Earls*, 53 Ill. 237. An attorney residing in Washington removed therefrom, and gave up the management of a case in the court of claims to another attorney without the knowledge of his client. *Held*, a voluntary withdrawal from the case, and the client was entitled to have an attorney of her own choosing substituted: *Jones v. United States*, 15 Ct. of Cl. 204.

§ 166. **Termination of Authority—By Termination of Suit.**—The general authority of the attorney ceases with the entry of judgment, or at least the issue of execution within the year.² So a party may sue out a writ of execution, *scire facias*, or attachment on an award or writ of error, by a different attorney, without giving notice of the change,³ or commence garnishment proceedings.⁴ So after judgment the attorney has no authority to revive or reverse the judgment.⁵ The authority con-

¹ *Coon v. Plymouth Plank Road Co.*, 32 Mich. 248.

² *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 Johns. 220; 6 Am. Dec. 335; *Gorham v. Gale*, 7 Cow. 739; 17 Am. Dec. 549; *McLain v. Watkins*, 43 Ill. 24. Assignment of a judgment by the plaintiff puts an end to the authority of his attorney in the cause; if, indeed, the entry of judgment does not: *Mordecai v. Charles-*

ton, 8 S. C. 100. After judgment in a justice's court, there is an implied authority to the attorney to receive service in subsequent proceedings: *Clark v. McGregor*, 55 Mich. 412.

³ *Thorp v. Fowler*, 5 Cow. 446; *State v. Gulick*, 17 N. J. L. 435; *McLaren v. Charrier*, 5 Paige, 530; *Burgess v. Abbott*, 6 Hill, 135.

⁴ *Hinkley v. Company*, 9 Minn. 55.

⁵ *Richardson v. Talbot*, 2 Bibb, 332.

tinues, unless expressly revoked, for a time for the purpose of enforcing the judgment.¹ In some states, moreover, it is held that the authority is not terminated until judgment is satisfied.²

§ 167. Termination of Authority—By Death.—The authority of the attorney is revoked by the death of the client,³ and he has no authority, without a new retainer, to appear for the client's executor or administrator.⁴ Where a party litigant dies after verdict, the authority of his attorney to act for him is thereby determined, and he can neither give nor receive notice of motion for new trial or of appeal.⁵ So the authority will be determined by the death of the attorney.⁶ Contracts for the service of attorneys who are partners in business, calling for professional skill, entitle the client to the service of each partner, and are determined by the death of either partner.⁷ It seems that, in the absence of any special agreement therefor, it is not the duty of a survivor of a firm of lawyers, dissolved by death, to carry on pending litigation, without charge, for the benefit of the estate of the deceased.⁸

§ 168. Termination of Authority—Other Cases.—The authority is terminated by the removal or suspension

¹ *Lusk v. Hastings*, 1 Hill, 656; *Adams v. Bank*, 23 How. Pr. 45; *Langdon v. Castleton*, 30 Vt. 285; *Gray v. Wass*, 1 Me. 257; *Flanders v. Sherman*, 18 Wis. 575; *Dearborn v. Dearborn*, 15 Mass. 316.

² *Gray v. Wass*, 1 Me. 257; *Nichols v. Dennis*, R. M. Charl. 188; *Flanders v. Sherman*, 18 Wis. 575.

³ *Gleason v. Dodd*, 4 Met. 333; *Wood v. Hopkins*, 3 N. J. L. 689; *Putnam v. Van Buren*, 7 How. Pr. 31; *Austin v. Monroe*, 4 Lans. 67; *Judson v. Love*, 35 Cal. 463; *Risley v. Fellows*, 10 Ill. 531; *Beach v. Gregory*, 2 Abb. Pr. 206; *Balbi v. Duvel*, 3 Edw. Ch. 418

(except in extraordinary cases, see *Booth v. Steer*, 7 Jur. 678); *Hamers v. State*, 57 Ind. 1; *Clark v. Parish*, 1 Bibb, 547; *Campbell v. Kincaid*, 3 T. B. Mon. 68; *Adams v. Nellis*, 59 How. Pr. 385; *Wilson v. Smith*, 22 Gratt. 493; *Amore v. La Mothe*, 5 Abb. N. C. 146; *Doty v. Dexter*, 61 Mich. 348.

⁴ *Gleason v. Dodd*, 4 Met. 333.

⁵ *Judson v. Love*, 35 Cal. 463.

⁶ *Weeks on Attorneys*, secs. 248, 256; *Hildreth v. Harvey*, 3 Johns. Cas. 300.

⁷ *McGill v. McGill*, 2 Met. (Ky.) 258.

⁸ *Sterne v. Goep*, 20 Hun, 396.

from office of the attorney,¹ or his ceasing to act as attorney, or his removal from the state,² or by war.³

§ 169. Implied Powers of Attorneys.—The retainer to prosecute or defend a suit confers on the attorney very large powers. A client who puts his case into the hands of an attorney impliedly authorizes such action as the latter, with his superior knowledge of the law, decides to be legal, necessary, and proper in the prosecution or defense of the suit.⁴ Agreements made by attorneys in a cause, as to the manner of conducting it, will bind the clients, and be enforced by the courts, even though they are not strictly legal contracts. But they must be just and equitable.⁵ The client, as in the case of other kinds of agency, is bound by all the acts of the attorney within the scope of his authority.⁶ As between the client and

¹ Weeks on Attorneys, sec. 248.

² *Chautauque Co. Bank v. Risley*, 6 Hill, 375.

³ *Blackwell v. Willard*, 65 N. C. 553; 6 Am. Rep. 749.

⁴ *Foster v. Wiley*, 27 Mich. 244; *Lacoste v. Robert*, 11 La. Ann. 33; *Union Bank v. Geary*, 5 Pet. 98; *Farmers' Bank v. Ketchum*, 4 McLean, 120; *Hart v. Spalding*, 1 Cal. 213; *Gorham v. Gale*, 7 Cow. 739; *Lawson v. Bettison*, 12 Ark. 401; *Commissioners v. Younger*, 29 Cal. 147; 87 Am. Dec. 164. "A client has no right to interfere with the attorney in the due and orderly conduct of the suit, and certainly cannot claim to retain a judgment obtained, and an execution issued fraudulently": *Read v. French*, 28 N. Y. 293.

⁵ *Lockwood v. Black Hawk Co.*, 34 Iowa, 235; *McCann v. McLennan*, 3 Neb. 25. In *Howe v. Lawrence*, 22 N. J. L. 99, the court say: "Justice requires that agreements fairly made between attorneys or parties in the progress of a cause, relating to the conduct of suit, should be fairly and faithfully enforced, not because they are technically contracts, and legally binding upon the parties, but because the administration of justice is thereby

facilitated. An agreement to waive an irregularity, to postpone or delay a trial, to take short notice of argument, to permit a cause to be brought to hearing summarily, these, and arrangements like them, do not partake of the essence of legal contracts. They are founded upon no consideration; they require no mutuality; if violated, no action lies for their breach. The court may refuse to enforce them, unless reduced to writing and filed, or they may enforce them in whole or in part, at their discretion. In short, they are regarded as a part of the machinery for the conduct of the cause entirely under the control of the court, and they will be enforced, or not, as the substantial rights of the parties and the ends of justice may require. And undoubtedly, in the exercise of this discretion, courts will see that if a mutual agreement be made, or a consent be given, or a waiver of right be made upon one side in consideration of a consent or a waiver of right upon the other, that it shall not be partially enforced, to the prejudice of the rights of either."

⁶ Weeks on Attorneys, sec. 216; *Russell v. Lane*, 1 Barb. 519; *Chambers v. Hodges*, 23 Tex. 104; *Fairbanks*

the opposite party, the former is bound by every act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious the act may be.¹ The client may be bound by stipulations of his attorney, made before a suit is instituted.² The attorney of a party has the exclusive control of the conduct and management of a suit, and neither the party nor his agent or attorney in fact has authority to sign a stipulation for a continuance.³ Where a party to an action has an attorney of record, a stipulation signed by the party in person, granting time to file a statement, will be disregarded. The attorney has the exclusive management and control of the case; and his temporary absence from the county does not affect the rule.⁴

ILLUSTRATIONS.—The plaintiffs in a suit instructed their attorney to settle on certain terms, coupled with a certain condition, and afterwards spoke to the defendants of the terms as terms of settlement, without saying anything about the condition; and the attorney never mentioned the condition, but settled upon the other terms proposed, and the defendants believed that the attorney had authority to settle as he did. *Held*, that the plaintiffs were bound by the settlement: *Peru Steel etc. Co. v. Whipple File etc. Co.*, 109 Mass. 464. A mortgagee directed his attorney to foreclose by publication. This the attorney did, and then without orders from the mortgagee brought suit on the mortgage. *Held*, that the proceedings by publication were waived, the suit being within the scope of the attorney's authority: *Burgess v. Stevens*, 76 Me. 559.

§ 170. Implied Powers of Attorneys (Continued) — Admissions — Affidavits — Altering Securities — Appeal — Arbitration — Arrest — Assignment — Attachment.—The attorney has authority to make admissions and represen-

v. Stanley, 18 Me. 296; *Rice v. Wilkins*, 21 Me. 558; *Sampson v. Ohleyer*, 22 Cal. 200; *Lawson v. Bettison*, 12 Ark. 401; *Bethel v. Carmack*, 2 Md. Ch. 143; *Nave v. Baird*, 12 Ind. 318; *North Mo. R. R. Co. v. Stephens*, 36 Mo. 150; 88 Am. Dec. 138.

¹ Weeks on Attorneys, sec. 222.

² *Hefferman v. Burt*, 7 Iowa, 320; 71 Am. Dec. 445.

³ *Nightingale v. Oregon Central R. Co.*, 2 Saw. 338.

⁴ *Mott v. Foster*, 45 Cal. 72.

tations of fact either in court or out of it.¹ The admissions of an attorney, to bind his client must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial.² But if made long after a case has been tried, and his employment is ended, they are not binding,³ and his admissions alone cannot prove his employment.⁴ Where counsel for the plaintiff admitted that he could not recover on a count, and the question was one of law, it was held that as counsel could not make the law, his admission would not be binding on his client.⁵ He may make oath to a petition in insolvency,⁶ may verify papers by affidavit,⁷ may substitute one security for another,⁸ may bind his client on a recognizance for appeal,⁹ and of course (and it is his

¹ *Pike v. Emerson*, 5 N. H. 393; 22 Am. Dec. 468; *Talbot v. McGee*, 4 T. B. Mon. 377; *Farmers' Bank v. Sprigg*, 11 Md. 389; *Smith v. Dixon*, 3 Met. (Ky.) 438; *Starke v. Keenan*, 11 Ala. 819; *Wenans v. Lindsey*, 1 How. (Miss.) 577; *Gilkeson v. Snyder*, 8 Watts & S. 200; *Rogers v. Greenwood*, 14 Minn. 333; *Harvey v. Thorpe*, 28 Ala. 250; 65 Am. Dec. 344; *Rosenbaum v. State*, 33 Ala. 362; *Central Branch R. R. Co. v. Shoup*, 28 Kan. 394; 42 Am. Rep. 163; *Wilson v. Spring*, 64 Ill. 14. In *Lewis v. Sumner*, 13 Met. 272, *Shaw, C. J.*, said: "The importance of upholding agreements and concessions like the present, between attorneys and counsel of litigating parties, is greater than it might seem at first blush, and is enhanced by our present practice. In most cases of controverted facts, many facts are embraced in the issue which are not really in dispute between the parties; but each must be prepared to prove all the facts necessary to his own case, unless he can previously obtain a concession from the adverse party, in a form which he can rely upon at the trial. It is therefore a wise, useful, and beneficial practice, resorted to by those who are most careful in preparing causes for trial, and a practice well deserving to be encouraged by the courts, for the parties, by their attor-

neys, to obtain and give mutual concessions, in writing, of all the material facts, not intended to be controverted, and so narrow the litigation to the precise matters in controversy. It saves expense, avoids surprise and delay, and often prevents the loss of a good cause by an unexpected call for proof, which could easily have been obtained, if it had been anticipated that such fact would be called in question. This practice of admitting facts is the more necessary, since the disuse of special pleadings, which was designed, and to some extent had the effect, to narrow the issue on record to some one or a few questions of fact."

² *Treadway v. Sioux City etc. R. R. Co.*, 40 Iowa, 526.

³ *Walden v. Bolton*, 55 Mo. 405.

⁴ *Weeks on Attorneys*, sec. 225.

⁵ *Mitchell v. Cotten*, 3 Fla. 136. Hasty, inconsiderate admissions made by the attorney in the course of a trial do not bind the client, though he was present and did not dissent: *Davidson v. Gifford*, 100 N. C. 18.

⁶ *O'Neil v. Glover*, 5 Gray, 144.

⁷ *Wright v. Parks*, 10 Iowa, 342; *Bates v. Pike*, 9 Wis. 224.

⁸ *Monson v. Hawley*, 30 Conn. 51; 79 Am. Dec. 233.

⁹ *Adams v. Robinson*, 1 Pick. 461; *Ricketson v. Compton*, 23 Cal. 636; *aliter*, *Holbrook's Case*, 5 Cow. 35.

duty to do so in a proper case) may take an appeal,¹ but may not agree that no appeal will be taken.² An attorney who tried a cause below is not authorized to appear in the appellate court without a new retainer.³ A contract with an attorney to attend to a suit in the district court alone does not authorize him, without further authority, to take the cause to the supreme court; nor can he recover compensation for services in the supreme court without showing that he was employed to render the service, or was in some way recognized by his client as attorney in the suit.⁴ An attorney cannot prosecute an appeal after his client has settled the suit, although, under a contract between the attorney and client the former was to have as his compensation part of the land recovered, there being no question of an attorney's lien in the case.⁵ He may refer the cause to arbitration,⁶ but the client may revoke the submission before it is acted on.⁷ The attorney cannot change the terms of a submission entered into by his client.⁸ Formerly it was held that there must be a case pending to authorize an attor-

¹ *Grosvenor v. Danforth*, 16 Mass. 74; *Richardson v. Talbot*, 2 Bibb, 382; *Bach v. Ballard*, 13 La. Ann. 487. A city attorney has power to take an appeal in behalf of the city: *Connett v. Chicago*, 114 Ill. 233.

² *People v. Mayor*, 11 Abb. Pr. 66; *aliter*, *Pike v. Emerson*, 5 N. H. 393; 22 Am. Dec. 468.

³ *Covill v. Phy*, 24 Ill. 37.

⁴ *Hopkins v. Mallard*, 1 G. Greene, 117.

⁵ *Lavender v. Atkins*, 20 Neb. 206.

⁶ *Buckland v. Conway*, 16 Mass. 396; *Stokely v. Robinson*, 34 Pa. St. 315; *Morris v. Grier*, 76 N. C. 410; *Lee v. Grimes*, 4 Col. 185; *Talbot v. McGee*, 4 T. B. Mon. 377; *Scarborough v. Reynolds*, 12 Ala. 252; *Coleman v. Grubb*, 23 Pa. St. 393; *Brooks v. Durham*, 55 N. H. 559; *Jenkins v. Gillespie*, 10 Smedes & M. 31; 48 Am. Dec. 732; *Cahill v. Benn*, 6 Binn. 99; *Smith v. Bossard*, 2 McCord, 406; *Beverly v.*

Stephens, 17 Ala. 701; *Bates v. Vischer*, 2 Cal. 355; *Wade v. Powell*, 31 Ga. 1; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699; *Pike v. Emerson*, 5 N. H. 393; 22 Am. Dec. 468; *Wilson v. Young*, 9 Pa. St. 101; *Jones v. Horsey*, 4 Md. 306; 59 Am. Dec. 81; *Tilton v. U. S. Life Ins. Co.*, 8 Daly, 84; *Williams v. Tracy*, 95 Pa. St. 308; *Evars v. Kamphaus*, 59 Pa. St. 379; *North Whitehall v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361; *North Mo. R. R. Co. v. Stephens*, 36 Mo. 150; 88 Am. Dec. 138; *aliter*, *Haynes v. Wright*, 4 Hayw. (Tenn.) 313. In *McGinnis v. Curry*, 13 W. Va. 29, it is held that an attorney cannot make an agreement *in pais* to refer his client's cause to arbitration, though he may give such consent in open court.

⁷ *Coleman v. Grubb*, 23 Pa. St. 393.

⁸ *Jenkins v. Gillespie*, 10 Smedes & M. 31; 48 Am. Dec. 732.

ney to refer,¹ but that is probably not now required.² An attorney retained to make a motion to change the place of trial has authority to consent to a reference of the action.³ He may issue a *capias ad satisfaciendum*, and arrest the defendant;⁴ may sue out *scire facias* against bail.⁵ He has no authority to assign or transfer to a third person a note in his hands for collection,⁶ nor a judgment obtained by his client.⁷ An attorney to whom a creditor confides a discretionary power to collect a debt may bind his client by assenting to an assignment of the debtor's property for the benefit of his creditors.⁸ He may direct an attachment of property, or on mesne process,⁹ or discharge property from such attachment.¹⁰

§ 171. Implied Powers of Attorneys (Continued) — Compromise — Continuance — Contract — Discharge — Discontinuance — Employing Counsel — Error — Executing Bonds — Execution — Guaranty. — Whether an attorney or counsel has a right to compromise a cause, from his ordinary retainer, is a question on which the decisions differ. In England, after some hesitation,¹¹ the right has been allowed.¹² In America, some courts hold that an attorney has an implied authority to compromise a suit;¹³ others

¹ Kyd on Awards, sec. 45; Jenkins v. Gillespie, 10 Smedes & M. 31; 48 Am. Dec. 732.

² See note to Hutchins v. Johnson, 30 Am. Dec. 629.

³ Tiffany v. Lord, 40 How. Pr. 481.

⁴ Hyams v. Michel, 3 Rich. 303.

⁵ Dearborn v. Dearborn, 15 Mass. 316.

⁶ Goodfellow v. Landis, 36 Mo. 168; Annely v. De Saussure, 12 S. C. 488; Card v. Walbridge, 18 Ohio, 411; Penniman v. Patchin, 5 Vt. 346; Terhune v. Colton, 10 N. J. Eq. 21; Russell v. Drummond, 6 Ind. 216; White v. Hildreth, 13 N. H. 104.

⁷ Head v. Gervais, Walk. (Miss.) 431; 12 Am. Dec. 577; Boren v. McGhee, 6 Port. 432; 31 Am. Dec. 695; Wilson v. Wadleigh, 36 Me. 496; Campbell's Appeal, 29 Pa. St. 401; 72

Am. Dec. 641; Mayer v. Blease, 4 S. C. 10; Maxwell v. Owen, 7 Coldw. 630; Fassitt v. Middleton, 47 Pa. St. 214; 86 Am. Dec. 535.

⁸ Gordon v. Coolidge, 1 Sum. 537.

⁹ Jenney v. Delesdernier, 20 Me. 183; Fairbank v. Stanley, 18 Me. 206; Kirksey v. Jones, 7 Ala. 622.

¹⁰ Moulton v. Bowker, 115 Mass. 36; 15 Am. Rep. 72; Monson v. Hawley, 30 Conn. 51; 79 Am. Dec. 233; Benson v. Carr, 73 Me. 76.

¹¹ Swinfen v. Swinfen, 24 Beav. 549; 2 De Gex & J. 381.

¹² Strauss v. Francis, L. R. 1 Q. B. 379; Thomas v. Harris, 27 L. J. Ex. 355; Ex parte Wenham, 21 Week. Rep. 104.

¹³ Wieland v. White, 109 Mass. 392; Doon v. Donaher, 113 Mass. 151; Potter v. Parsons, 14 Iowa, 286; Levy v.

that he has not;¹ and in any event the power cannot exist after judgment² or award,³ or against the consent of the

Brown, 56 Miss. 83; *Bonney v. Morril*, 57 Me. 380; *People v. Quick*, 92 Ill. 580; *Jeffries v. New York Mut. Life Ins. Co.*, 110 U. S. 305. In *De Louis v. Meek*, 2 G. Greene, 55, 50 Am. Dec. 491, it is said that equity is disinclined to disturb a compromise made by an attorney unless it works injustice, and is injurious to his client. In *Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42, a fair compromise made with the assent of the party in interest, though without the knowledge of the plaintiff of record, was upheld, though the court ruled that an attorney had no implied authority to compromise. "The decisions," said *Durlee, C. J.*, "on the power of an attorney to compromise are contradictory. In England, however, the doctrine established by the later cases, after some vacillation, is, that the attorney has power by virtue of his retainer

to compromise the action in which he is retained, provided he acts *bona fide* and reasonably, and does not violate the positive instructions of his client, and that the compromise will bind the client, even if he does violate instructions, unless the violation is known to the adverse party: *Swinfen v. Swinfen*, 18 Com. B. 485; *Swinfen v. Lord Chelmsford*, 5 Hurl. & N. 890; *Chambers v. Mason*, 5 Com. B., N. S., 59; *Chown v. Parrott*, 14 Com. B., N. S., 74; *Prestwich v. Poley*, 18 Com. B., N. S., 806; *Fray v. Voules*, 1 El. & E. 839; *Butler v. Knight*, L. R. 2 Ex. 109; *Thomas v. Harris*, 27 L. J., N. S., Ex. 353; *In re Wood*, Ex parte *Wenham*, 21 Week. Rep. 104. The reason is, the attorney, within the scope of his retainer, is considered the general agent of the client. And it is strongly argued in support of the power that it ought to be upheld, both as a matter

¹ *Smith v. Dickson*, 3 Met. (Ky.) 438; *Mandeville v. Reynolds*, 68 N. Y. 528; *Vail v. Jackson*, 15 Vt. 314; *Dewort v. Loomer*, 21 Conn. 245; *Pickett v. Merchants' Bank*, 32 Ark. 346; *Holker v. Parker*, 7 Cranch, 452; *Huston v. Mitchell*, 14 Serg. & R. 307; 16 Am. Dec. 506; *Stokely v. Robinson*, 34 Pa. St. 315; *Preston v. Hill*, 50 Cal. 43; 19 Am. Rep. 647; *Fitch v. Scott*, 3 How. (Miss.) 314; 34 Am. Dec. 86; *Granger v. Batchelder*, 54 Vt. 248; 41 Am. Rep. 846; *Black v. Rogers*, 75 Mo. 441; *Moye v. Cogdell*, 69 N. C. 93; *Adams v. Roller*, 35 Tex. 711; *Maddux v. Bevan*, 39 Md. 485; *Walden v. Bolton*, 55 Mo. 405; *Spears v. Ledergerber*, 56 Mo. 465; *Wadhams v. Gay*, 73 Ill. 415; *Amrose v. McDonald*, 53 Cal. 28; *Houaenick v. Miller*, 93 Pa. St. 514; *Isaacs v. Zugsmith*, 103 Pa. St. 77; *Whipple v. Whitman*, 13 R. I. 512; 43 Am. Rep. 42; *Mackey v. Adair*, 99 Pa. St. 143; *North Whitehall v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361; *Robinson v. Murphy*, 69 Ala. 543; *Miller v. Lane*, 13 Ill. App. 648; *Whittington v. Ross*, 8 Ill. App. 234; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Stuck v. Reese*, 15 Iowa, 122;

Fritchey v. Bosley, 56 Md. 94; *Davidson v. Rozier*, 23 Mo. 387; *Shaw v. Kidder*, 2 How. Pr. 244; *Barrett v. Railroad Co.*, 45 N. Y. 628; *Hamrick v. Coombs*, 14 Neb. 381; *Filby v. Miller*, 25 Pa. St. 264; *Treasurers v. McDowell*, 1 Hill (S. C.), 184; 26 Am. Dec. 166; *Pierce v. Brown*, 8 Biss. 534; *North Missouri R. R. Co. v. Stephens*, 36 Mo. 150; 88 Am. Dec. 133; *Wetherbee v. Fitch*, 117 Ill. 67; *Eaton v. Knowles*, 61 Mich. 626. In Texas, it is said that although strictly an attorney has not authority, as such, to compromise a claim, yet the court will only interfere where the compromise was clearly unreasonable, and the client entirely blameless and free from laches: *Roller v. Wooldridge*, 46 Tex. 485. The same view is taken in *Holker v. Parker*, 7 Cranch, 436.

² *Weeks on Attorneys*, sec. 231, citing *Jones v. Ransom*, 3 Ind. 327; *Jenkins v. Gillespie*, 10 Smedes & M. 31; 48 Am. Dec. 732; *Pendexter v. Vernon*, 9 Humph. 84; *Wilson v. Jennings*, 3 Ohio St. 528.

³ *Township of North Whitehall v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361.

client.¹ In Indiana it is said that in extraordinary cases where delay might prove injurious, and there is no opportunity for communication between an attorney and his client, the former may compromise a claim without special authority.² In a number of cases the courts, while recognizing the principle that the attorney has no implied authority to compromise, have refused to set aside such compromises when fair and judicious, and not to the in-

of public policy and for the good of the client, inasmuch as the attorney generally knows vastly better than the client whether it is better to risk the trial of the suit or to compromise it, and is often called upon to do the one or the other suddenly in the absence of the client: See Wharton on Agency, sec. 590. The English doctrine finds support in a few American cases: *Wieland v. White*, 109 Mass. 392; *Potter v. Parsons*, 14 Iowa, 286; *Holmes v. Rodgers*, 13 Cal. 191; *North Missouri R. R. Co. v. Stephens*, 36 Mo. 150; 88 Am. Dec. 138; *Reinholdt v. Alberti*, 1 Binn. 469; but the main current of decision in this country runs powerfully against it: *Weeks on Attorneys at Law*, sec. 228; *Ambrose v. McDonald*, 53 Cal. 28; *Preston v. Hill*, 50 Cal. 43; 19 Am. Rep. 647; *Levy v. Brown*, 56 Miss. 83; *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346; *Walden v. Bolton*, 55 Mo. 405; *Mandeville v. Reynolds*, 68 N. Y. 528; *Wadhams v. Gay*, 73 Ill. 415; *People v. Quick*, 92 Ill. 580. The American courts, however, show a leaning in favor of such compromises, when fairly made, and readily uphold them if they can find grounds on which to do so. 'Although,' says Chief Justice Marshall, in *Holker v. Parker*, 7 Cranch, 436, 452, 'an attorney at law merely as such has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be excluded against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised.' See also *Roller v. Wooldridge*, 46 Tex. 485; *Potter v. Parsons*, 14 Iowa, 286. In the case

at bar there are several reasons why the court should not disturb the compromise. The compromise was in itself fair and reasonable, if not eminently advantageous. We mention this rather as a favorable feature than as an absolute reason for upholding the compromise, since a party who prefers litigation to settlement is generally entitled to enjoy his preference: *Fray v. Voules*, 1 El. & E. 839. The case here, however, was peculiar in its circumstances. The plaintiff was suing, not for himself, but as trustee for his wife. She was the real owner, so to speak, of the lawsuit. Under our statute (Gen. Stat. R. I., c. 152, sec. 6), she might, for aught we can see, have assigned for valuable consideration her equitable or beneficial interest in the suit, or in the debt sued for, absolutely and without joinder with her husband, to some third person, or even to the defendant himself. But if she had the right to do this, we do not see why she had not also the right, in the absence of her husband, acting under the advice of trustworthy friends, to enter into a fair and reasonable compromise of the suit. To hold that the husband might arbitrarily reject a compromise which she desired, would be to put her completely at his mercy. It seems to us that the most which he could require, considering his purely titular relation to the suit, would be indemnity for his costs and expenses as trustee, which, in the case here, he seems to have substantially got in the settlement."

¹ *Preston v. Hill*, 50 Cal. 43; 19 Am. Rep. 647.

² *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

jury of the client.¹ An attorney employed to obtain possession of real estate by legal proceedings cannot bind his principal by an agreement to pay a sum of money for the possession.² If orders be given by the creditor to an attorney, "to obtain immediate security" for a demand, the whole manner of doing it is left in the discretion of the attorney, and the creditor is bound by his acts.³ An attorney who is a director in a railroad company, and is openly employed to prosecute a suit against the road, may compromise the suit and recover his fees for legal services in the case.⁴ Where an attorney compromises his client's claim without express authority, the client may ignore such settlement and recover from the adverse party the full amount of his demand.⁵ He has authority to agree to a continuance.⁶ He cannot contract for the sale of land,⁷ nor to refund money overpaid,⁸ nor can he contract generally as to the subject of the litigation.⁹ An attorney has no authority, by virtue of his employment as such, to instruct a sheriff to conduct a business, such as a restaurant, upon which an attachment has been levied, and thereby bind his client for the expenses incurred.¹⁰ He cannot discharge the debt without satisfaction.¹¹ He may dismiss or discontinue an action;¹² or agree to a non-suit.¹³ He has no authority to enter a *retratrix*.¹⁴ In an

¹ Whipple v. Whitman, 13 R. I. 512; 43 Am. Rep. 42; Williams v. Nolan, 58 Tex. 708; Black v. Rogers, 75 Mo. 441.

² Stuck v. Reese, 15 Iowa, 122.

³ Rice v. Wilkins, 21 Me. 558.

⁴ Christie v. Sawyer, 44 N. H. 298.

⁵ Jones v. Inness, 32 Kan. 177.

⁶ Weeks on Attorneys, sec. 236; but not to agree with other attorneys not to try causes during a particular time: Robert v. Commercial Bank, 13 La. 528; 33 Am. Dec. 570.

⁷ Burkhardt v. Schmidt, 10 Phila. 118.

⁸ Ireland v. Todd, 36 Me. 149.

⁹ Annelly v. De Saussure, 12 S. C. 483.

¹⁰ Alexander v. Denaveaux, 53 Cal. 663.

¹¹ Kellogg v. Gilbert, 10 Johns. 220; 6 Am. Dec. 335; Simonton v. Barrell, 21 Wend. 362.

¹² Gailard v. Smart, 6 Cow. 385; McLeran v. McNamara, 55 Cal. 508; Paxton v. Cobb, 2 La. 137; Rogers v. Greenwood, 14 Minn. 333. An attorney for the defendant in an action in ejectment has authority to bind his client by a stipulation to dismiss a demand by defendant, under the statute, for a second trial: Bray v. Dobenev, Minn., 1888.

¹³ Lynch v. Cowell, 12 L. T. 548.

¹⁴ Lambert v. Sandford, 2 Blackf. 137; 18 Am. Dec. 149.

action against a married woman, the court will not sanction an order of discontinuance, entered on the plaintiff's consent, without the knowledge of the defendant's counsel; for the court is called upon to protect her and her counsel and attorney from such consent.¹ He cannot employ counsel,² nor pledge his client's credit for fees.³ He may order briefs printed at the client's expense.⁴ He has power to bring a writ of error to revise a judgment.⁵ He may execute a recognizance on appeal.⁶ But it has been held that he has no authority to indemnify a person who becomes a surety on an injunction bond,⁷ or to execute a replevin bond.⁸ He may sue out an execution or an *alias* execution,⁹ and control the execution.¹⁰ He has no authority to stay an execution.¹¹ An attorney who is employed to prosecute a suit for the collection of a claim has implied authority to sign, in his client's name, an agreement to indemnify the sheriff for a levy on execution.¹² An attorney, though authorized, is not bound to receive money collected for his client on execution.¹³ He may give an officer indemnity for serving an execution.¹⁴ He may not bind his client to indemnify a third party who has become his security in an injunction suit.¹⁵ He cannot indorse a note left with him for collection.¹⁶

**§ 172. Implied Powers of Attorney (Continued)—
Judgment—Payment.**—He may confess or agree to con-

¹ *McKenzie v. Rhodes*, 13 Abb. Pr. 337; 21 How. Pr. 467.

² Unless the client be absent: *Briggs v. Georgia*, 10 Vt. 68; but see *Rogers v. McKenzie*, 81 N. C. 164.

³ *Mostyn v. Mostyn*, L. R. 5 Ch. 457.

⁴ *Weisse v. New Orleans*, 10 La. Ann. 46; *Williamson-Stewart Paper Co. v. Bosbyshell*, 14 Mo. App. 534.

⁵ *Grosvenor v. Danforth*, 16 Mass. 74.

⁶ *Adams v. Robinson*, 1 Pick. 462; but see *Ex parte Holbrook*, 5 Cow. 35; *Clark v. Courser*, 29 N. H. 170.

⁷ *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699.

⁸ *Narragansett Prop. v. Wentworth*, 36 Me. 339.

⁹ *Cheever v. Mierick*, 2 N. H. 376.

¹⁰ *Read v. French*, 23 N. Y. 293.

¹¹ *Reynolds v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57; *contra*, *Albertson v. Goldsby*, 28 Ala. 711; 65 Am. Dec. 380.

¹² *Schoregge v. Gordon*, 29 Minn. 367.

¹³ *Poole v. Gist*, 4 McCord, 259.

¹⁴ *Clark v. Randall*, 9 Wis. 135; 76 Am. Dec. 252.

¹⁵ *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699.

¹⁶ *Child v. Eureka Powder Works*, 44 N. H. 354; *White v. Hildreth*, 13 N. H. 104.

fess judgment.¹ Where one was arrested on a charge of violating a city ordinance, gave an invalid recognition in three hundred dollars to appear for trial, but failed to appear, and money to that amount, taken from him by the arresting officer, was placed in the hands of the city attorney, it was held that an attorney merely retained in the defense had no authority to direct that the money be paid into the city treasury.² He may receive payment of a judgment,³ or give a receipt for money due;⁴ receive payment of a debt due the client,⁵ or receive part payment.⁶ The employment of an attorney at law to examine the title to lands on which a mortgage loan is about to be made does not authorize him to receive, as agent of the proposed lender, his employer, money from the borrower, to be used in satisfying prior liens. His duty extends only to ascertaining and reporting the liens. If the borrower furnishes him with money to pay them, and he misapplies it, the employer is not liable.⁷ A solicitor or agent who is employed to procure the assignment of a bond and mortgage, or to invest money upon

¹ *Denton v. Noyes*, 6 Johns. 298; 5 Am. Dec. 237; *Lyon v. Williams*, 42 Ga. 168; *Thompson v. Pershing*, 86 Ind. 303; *Potter v. Parsons*, 14 Iowa, 286; *Farmers' Bank v. Sprigg*, 11 Md. 389; *Holmes v. Rogers*, 13 Cal. 191; *Jones v. Williamson*, 5 Cold. 371; *contra*, *Edwards v. Edwards*, 29 La. Ann. 597; *People v. Lamborn*, 2 Ill. 123; *Wadhams v. Gay*, 73 Ill. 415; *Pfister v. Wade*, 69 Cal. 133.

² *Bloomington v. Heiland*, 67 Ill. 278.
³ *Johnson v. Gibbons*, 27 Gratt. 632; *Frazier v. Parks*, 56 Ala. 363; *Langdon v. Potter*, 13 Mass. 320; *Wilson v. Stokes*, 4 Munf. 455; *Brackett v. Norton*, 4 Conn. 517; 10 Am. Dec. 179; *Carroll Co. v. Cheatham*, 48 Mo. 385; *Conway Co. v. Little Rock R. R. Co.*, 39 Ark. 50; *Wycoff v. Bergen*, 1 N. J. L. 214; *McCarver v. Nealey*, 1 G. Greene, 360; *State v. Hawkins*, 28 Mo. 366; *Ely v. Harvey*, 6 Bush, 620; *McDonald v. Todd*, 1 Grant Cas. 17; *Branch v. Burnley*, 1 Call, 147; *Rogers v. McKenzie*, 81 N. C. 164; *Miller v.*

Scott, 21 Ark. 396; *Erwin v. Blake*, 8 Pet. 17; *Yoakum v. Tilden*, 3 W. Va. 167; 100 Am. Dec. 738; *Harper v. Harvey*, 4 W. Va. 539.

⁴ *Yoakum v. Tilden*, 3 W. Va. 167; 100 Am. Dec. 738; *Miller v. Scott*, 21 Ark. 396.

⁵ *Yates v. Freckleton*, 2 Doug. 623; *Langdon v. Potter*, 13 Mass. 319; *Ely v. Harvey*, 6 Bush, 620; *Carroll Co. v. Cheatham*, 48 Mo. 385; *Ruckman v. Allwood*, 44 Ill. 183; *Miller v. Scott*, 21 Ark. 396; *McCarver v. Nealey*, 1 G. Greene, 360; *Gray v. Wass*, 1 Me. 257; *Branch v. Burnley*, 1 Call, 147; *Megary v. Funtis*, 5 Sand. 376; *Ducett v. Cunningham*, 39 Me. 386; *Erwin v. Blake*, 8 Pet. 18; *Fatten v. Fullerton*, 27 Me. 58; *State v. Hawkins*, 28 Mo. 366; *Varley v. Garrad*, 2 Dowl. Pr. 490; *Hudson v. Johnson*, 1 Wash. (Va.) 9; *Carroll Co. v. Cheatham*, 48 Mo. 385; *Jackson v. Mayor*, 78 Ga. 343.

⁶ *Pickett v. Bates*, 3 La. Ann. 627.
⁷ *Josephthal v. Heyman*, 2 Abb. N. C. 22.

such securities, is not thereby authorized to receive either the principal or interest, where his client or constituent takes and retains the possession of the securities.¹ He may not receive payment in anything but lawful money.² He cannot take depreciated money;³ as confederate notes.⁴ He cannot take real estate,⁵ nor other securities,⁶ nor a bond,⁷ nor county warrants,⁸ nor notes of third persons,⁹ nor a draft on a third person,¹⁰ nor an assignment of another judgment.¹¹ Although, as a general rule, where a note has been left with an attorney with authority to receive payment thereof, payments made to such attor-

¹ *Williams v. Walker*, 2 Sand. Ch. 325.

² *Kent v. Ricards*, 3 Md. Ch. 392; *Campbell v. Bagley*, 19 La. Ann. 172; *Wright v. Daily*, 26 Tex. 730; *Clark v. Kingsland*, 1 Smedes & M. 248; *Nolan v. Jackson*, 16 Ill. 272; *Lawson v. Bettison*, 12 Ark. 408; *Walker v. Scott*, 13 Ark. 644; *West v. Ball*, 12 Ala. 340; *Miller v. Edmonston*, 8 Blackf. 291; *Commissioners v. Rose*, 1 Desaus. Eq. 469; *Huston v. Mitchell*, 14 Serg. & R. 307; 16 Am. Dec. 506; *Wilkinson v. Holloway*, 7 Leigh, 277; *Givens v. Briscoe*, 3 J. J. Marsh. 529; *Trumbull v. Nicholson*, 27 Ill. 149; *Maddux v. Bevan*, 39 Md. 493; *Moye v. Cogdell*, 69 N. C. 93; *Wiley v. Mahood*, 10 W. Va. 206; *Kent v. Chapman*, 18 W. Va. 485; *McCarver v. Nealey*, 1 G. Greene, 360; *Perkins v. Grant*, 2 La. Ann. 328; *Lord v. Burbank*, 18 Me. 178; *Baldwin v. Merrill*, 8 Humph. 132; *Lewis v. Woodruff*, 15 How. Pr. 539; *Pendexter v. Vernon*, 9 Humph. 84; *Bigley v. Toy*, 68 Iowa, 687. (In *Livingston v. Radcliff*, 6 Barb. 201, it was held that he might take part in money and part in a good short note.) *Herriman v. Shomon*, 24 Kan. 387; 36 Am. Rep. 261. An attorney employed to collect a note has no implied authority to accept wood in payment thereof: *Pitkin v. Harris*, 23 Mich. 617.

³ *Trumbull v. Nicholson*, 27 Ill. 149; *West v. Ball*, 12 Ala. 340; *Chapman v. Cowles*, 41 Ala. 103; 91 Am. Dec. 508; *Davis v. Lee*, 20 La. Ann. 248; *Lawson v. Bettison*, 12 Ark. 401.

⁴ *Harper v. Harvey*, 4 W. Va. 539;

Alspaugh v. Jones, 64 N. C. 29; *Railey v. Bagley*, 19 La. Ann. 172; *Davis v. Lee*, 20 La. Ann. 248. Unless from the situation of the parties assent to the receipt of such money may be presumed: *Ellis v. Heptinstall*, 8 W. Va. 388.

⁵ *Huston v. Mitchell*, 14 Serg. & R. 307; 16 Am. Dec. 506; *Stackhouse v. O'Hara*, 14 Pa. St. 88, the court saying: "The limitations as to his authority imposed on him by the law relate generally to compromises, such as substituting one thing for another, as land for money, or to acts after judgment. These are without the range of that professional learning and skill which constituted in fact the groundwork of the relation of counsel and client."

⁶ *Walker v. Scott*, 13 Ark. 634.

⁷ *Maddux v. Bevan*, 39 Md. 485; *Smock v. Dade*, 5 Rand. 639; 16 Am. Dec. 780; *Kirk v. Glover*, 5 Stew. & P. 340.

⁸ *Herriman v. Shomon*, 24 Kan. 387; 36 Am. Rep. 261.

⁹ *Jones v. Ransom*, 3 Ind. 327; *Jeter v. Haviland*, 24 Ga. 252; *Cook v. Bloodgood*, 7 Ala. 683; *Langdon v. Potter*, 13 Mass. 319; *Garvin v. Lowrey*, 7 Smedes & M. 24; *Miller v. Edmonston*, 8 Blackf. 291.

¹⁰ *Moye v. Cogdell*, 69 N. C. 93; *Drain v. Doggett*, 41 Iowa, 682; *Graydon v. Patterson*, 12 Iowa, 256. He may accept as payment a check which is duly paid by a bank on which it is drawn: *Harbach v. Colvin*, 73 Iowa, 638.

¹¹ *Clark v. Kingsland*, 1 Smedes & M. 248.

ney in specific articles, instead of money, would not be good payments and binding on the principal, yet if one of such payments, so made to the attorney, is received by the principal, and the note is still suffered to remain in the hands of the attorney, and no objection is made either to the attorney or to the debtor, such payments would go in discharge of the note in the same way as if they had been made in money.¹ He may not receive payment after the relation of attorney and client has ceased,² or after notice by the client to the debtor not to pay him.³ A solicitor in chancery has no authority by virtue of his position to assign a decree obtained for his client for less than the full amount.⁴ A fraudulent receipt for the amount of a judgment in favor of his client is not binding on the latter.⁵ Under a general authority to collect debts by suit, and to appear in and defend actions, he may not bid for his principal at a sheriff's sale of land mortgaged to the principal.⁶ He is merely agent of his client, and the title to the property which he collects is in the client, and not in him.⁷

ILLUSTRATIONS.—An order of condemnation of a water right was rendered, conditioned upon the payment within a year of the damages found. *Held*, that a payment to the attorney who conducted the proceedings did not bind the client, the attorney's authority ending with the termination of the proceedings: *Test v. Larsh*, 98 Ind. 301. A person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person, and not indorsed. *Held*, that a payment by the attorney of the proceeds of the note to the payee will discharge him from all liability to the person who placed the note in his hands: *Peck v. Wallace*, 19 Ala. 219. A warrant for the payment of public money is properly issued to A, or his attorney, and the attorney sells it to one who buys it in good faith. *Held*, that such buyer

¹ *Patten v. Fullerton*, 27 Me. 58; see *Baldwin v. Morrill*, 8 Humph. 132.

² *Ruckman v. Alwood*, 44 Ill. 183.

³ *Weist v. Lee*, 3 Yeates, 47.

⁴ *Rice v. Troup*, 62 Miss. 186.

⁵ *Chalfants v. Martin*, 25 W. Va. 394.

⁶ *Fife v. Bohlen*, 22 Fed. Rep. 878.

⁷ *Cotton v. Sharpstein*, 14 Wis. 226; 80 Am. Dec. 774.

is not liable to A: *McCloskey v. Sutro*, 64 Cal. 485. An attorney recovered judgment on his principal's claim given him to collect. *Held*, that he could not, without express authority, waive his client's judgment lien by filing the claim in proceedings for a distribution of the proceeds of a sale of the debtor's property under a deed of trust: *Horsey v. Chew*, 65 Md. 555.

§ 173. **Implied Powers of Attorneys (Continued)—Process—Purchase—Release—Sell—Set-off—Sue—Supplementary Proceedings—Waivers and Releases.**—He cannot direct a levy of goods upon process,¹ or accept service of a summons on his client.² He has no authority to admit service of the original summons which commences the action.³ He may buy in his client's property at a sheriff's sale.⁴ He has no power, *virtute officii*, to purchase for his client at a judicial sale land sold under a mortgage held by the client.⁵ An attorney to collect a demand has no authority to release a surety thereon without satisfaction,⁶ nor the indorser of a note.⁷ He has no power to release or discharge his client's claim, or a judgment obtained by him, without payment.⁸ He cannot sell or assign a judgment of his client,⁹ or sell notes left with him for collection,¹⁰ or other claims,¹¹ or transfer notes left

¹ *Averill v. Williams*, 4 Denio, 295; 47 Am. Dec. 252; and indemnify the officer making it therefor: *Clark v. Randall*, 9 Wis. 135; 76 Am. Dec. 252.

² *Reed v. Reed*, 19 S. C. 548; *Starr v. Hall*, 87 N. C. 381.

³ *Masterson v. Le Claire*, 4 Minn. 163; *Starr v. Hall*, 87 N. C. 381; *Reed v. Reed*, 19 S. C. 548.

⁴ *Fabell v. Boyken*, 55 Ala. 383; *contra*, *Beardsley v. Root*, 11 Johns. 464; 6 Am. Dec. 386; *Averill v. Williams*, 4 Denio, 295; 47 Am. Dec. 253.

⁵ *Savery v. Sypher*, 6 Wall. 157.

⁶ *Givens v. Briscoe*, 3 J. J. Marsh. 529; *Savings Inst. v. Chinn*, 7 Bush. 539; *Stoll v. Sheldon*, 13 Neb. 207.

⁷ *Varnum v. Bellamy*, 4 McLean, 87; *East River Bank v. Kennedy*, 9 Bosw. 543.

⁸ *Harrow v. Farrow*, 7 B. Mon. 126; 45 Am. Dec. 60; *Chambers v. Miller*,

7 Watts, 63; *Tankersley v. Anderson*, 4 Desaus. Eq. 44; *Beers v. Hendrickson*, 45 N. Y. 665; *Mandeville v. Reynolds*, 68 N. Y. 528; *Carstens v. Barnstorf*, 11 Abb. Pr., N. S., 442; *Gilliland v. Gasque*, 6 S. C. 406.

⁹ *Maxwell v. Owen*, 7 Cold. 630; *Baldwin v. Merrill*, 8 Humph. 139; *Campbell's Appeal*, 29 Pa. St. 401; 72 Am. Dec. 641; *Rowland v. State*, 58 Pa. St. 196; *Mayer v. Blease*, 4 Rich. 10; *Head v. Gervais, Walk.* (Miss.) 431; 12 Am. Dec. 577; *Fassitt v. Middleton*, 47 Pa. St. 214; 86 Am. Dec. 535; *Clark v. Kingsland*, 1 Sinedes & M. 256; *Wilson v. Wadleigh*, 36 Me. 496; *Boren v. McGehee*, 6 Port. 432; 31 Am. Dec. 695.

¹⁰ *Goodfellow v. Landis*, 36 Mo. 168. ¹¹ *Card v. Walbridge*, 18 Ohio, 411; *Penniman v. Patchin*, 5 Vt. 346; *Rowland v. State*, 58 Pa. St. 196.

with him for collection.¹ He cannot set off a debt due to his client against a debt due from him to the debtor.² He may bring a new suit after being nonsuited,³ or restore an action after a *non pros*.⁴ He has power to institute supplementary proceedings, and procure the appointment of a receiver,⁵ but not to commence an action in the name of a receiver against a third person to set aside a conveyance from the judgment debtor.⁶ He cannot begin supplementary proceedings in the name of a deceased plaintiff, for whom, in his lifetime, he recovered judgment.⁷

He may waive objections to the form of a writ,⁸ agree to postpone execution on his judgment,⁹ waive objections to evidence,¹⁰ waive notices and give extensions of time to file papers,¹¹ waive verification of papers by affidavit,¹² objections to interrogatories,¹³ informalities, and irregularities generally.¹⁴ He may release, before judgment, an attachment of real estate.¹⁵ He cannot release a judgment on payment of a less sum than it is entered for,¹⁶ nor release sureties upon the claim of his client,¹⁷ nor give up his client's securities without payment,¹⁸ nor release the

¹ Russell v. Drummond, 6 Ind. 216; White v. Hildreth, 13 N. H. 104; Child v. Eureka etc. Works, 44 N. H. 354; Terhune v. Colton, 10 N. J. Eq. 21.

² Wiley v. Mahood, 10 W. Va. 206; Cost v. Genette, 1 Port. 212; Child v. Dwight, 1 Dav. & B. Eq. 171.

³ Scott v. Elmendorf, 12 Johns. 317.

⁴ Reinholdt v. Alberti, 1 Einn. 469.

⁵ Ward v. Roy, 69 N. Y. 96.

⁶ Ward v. Roy, 69 N. Y. 96.

⁷ Amore v. Lamotte, 5 Abb. N. C. 146.

⁸ Alton v. Gilmanton, 2 N. H. 520.

⁹ Union Bank v. Geary, 5 Pet. 99;

Wieland v. White, 109 Mass. 392.

¹⁰ Alton v. Gilmanton, 2 N. H. 520.

¹¹ Pike v. Emerson, 5 N. H. 393; 22

Am. Dec. 468; Bank v. Geary, 5 Pet.

99; Talbot v. McGee, 4 T. B. Mon. 377.

¹² Heffernan v. Burt, 7 Iowa, 320.

¹³ Roberts v. Harris, 32 Ga. 542.

¹⁴ Hanson v. Hoitt, 14 N. H. 56.

¹⁵ Moulton v. Bowker, 115 Mass. 36;

15 Am. Rep. 72; Benson v. Carr, 73 Me. 76.

¹⁶ Lewis v. Gamage, 1 Pick. 347;

Lewis v. Woodruff, 15 How. Pr. 539;

Wilson v. Wadleigh, 36 Me. 496; Har-

row v. Farrow, 7 B. Mon. 126; 45 Am.

Dec. 60; Chambers v. Miller, 7 Watts,

63; Beers v. Hendrickson, 45 N. Y.

665; Kirk's Appeal, 87 Pa. St. 243;

30 Am. Rep. 357; Carstens v. Barn-

storf, 11 Abb. Pr., N. S., 442; Pierce

v. Brown, 8 Biss. 534; Miller v. Lane,

13 Ill. App. 648; Robinson v. Murphy,

69 Ala. 543; Hamrick v. Combs, 14

Neb. 381; see Hampton v. Boylan, 46

Hun, 151.

¹⁷ Union Bank v. Govan, 10 Smedes

& M. 333; Givens v. Briscoe, 3 J. J.

Marsh. 532; Savings Inst. v. Chinn, 7

Bush, 539; East River Bank v. Ken-

nedy, 9 Bosw. 543; Stoll v. Sheldon,

13 Neb. 207; nor upon an undertaking

on appeal: Quinn v. Lloyd, 36 How.

Pr. 378.

¹⁸ Tankersly v. Anderson, 4 Deaus.

Eq. 45; Terhune v. Colton, 10 N. J.

Eq. 21.

defendant's property from the lien of an execution,¹ nor extend time on a debt due,² nor release a debt due,³ nor discharge an indorser upon a note due to his client,⁴ nor accept a deed for mortgaged land in satisfaction of a judgment of foreclosure,⁵ nor sell the evidence of indebtedness,⁶ nor release a party in interest,⁷ nor a witness,⁸ nor a defendant in custody on a *capias ad satisfaciendum*.⁹ And an attorney may not waive any substantial right of the client as to the form of the proceedings in the cause.¹⁰ An agreement between counsel, without authority from their clients, that the dismissal of an action shall be a bar to an action for malicious prosecution, is void.¹¹ But an agreement by the attorneys in several suits which are precisely similar, and in which the same defense is made, that they would abide the final judgment which should be rendered in one of them, binds the parties.¹² He cannot discharge a trustee,¹³ nor waive a right of inquisition,¹⁴ nor agree to suspend proceedings upon a judgment.¹⁵ He has no implied power to stipulate for additional time for the justice to render and docket his judgment.¹⁶

ILLUSTRATIONS.—An attorney was several times appealed to by his client for money on a mortgage note intrusted to him for collection, and in one letter was informed, "I am very much in want of funds, and you must sell." *Held*, that the attorney was authorized either to collect the amount or sell the security:

¹ Banks v. Evans, 10 Smedes & M. 35; 48 Am. Dec. 734; Phillips v. Dobbins, 56 Ga. 617; Benedict v. Smith, 10 Paige, 162; Willson v. Jennings, 3 Ohio St. 528; Dollar Savings Bank v. Robb, 4 Brewst. 106.

² Lockhart v. Wyatt, 10 Ala. 231; 44 Am. Dec. 481.

³ Gilliland v. Gasque, 6 Rich. 406.

⁴ East River Bank v. Kennedy, 9 Bosw. 543; Bowne v. Hyde, 6 Barb. 392; Varnum v. Bellamy, 4 McLean, 387.

⁵ Brown v. Kiene, 72 Iowa, 342.

⁶ Harbeck v. Colvin, 73 Iowa, 638.

⁷ In re Weigel, 18 La. Ann. 49.

⁸ Marshall v. Nagel, 1 Bail. 308; Bowne v. Hyde, 6 Barb. 392.

⁹ Kellogg v. Gilbert, 10 Johns. 229; 6 Am. Dec. 335; Treasurers v. McDowell, 1 Hill (S. C.), 184; 26 Am. Dec. 166.

¹⁰ Howe v. Lawrence, 22 N. J. L. 99.

¹¹ Carbourg v. Smith, 11 Kan. 554.

¹² North Missouri R. R. Co. v. Stephens, 36 Mo. 150; Ohlquest v. Farwell, 71 Iowa, 231.

¹³ Quarles v. Porter, 12 Mo. 76.

¹⁴ Hadden v. Clarke, 2 Grant Cas. 107.

¹⁵ Pendexter v. Vernon, 9 Humph. 84.

¹⁶ Flynn v. Hancock, 46 Hun, 368.

Ward v. Beals, 14 Neb. 114. In an action to recover money the complaint alleges and the answer denies that it was payable in gold coin. The attorney for the defendant cannot bind his client by a verbal stipulation made during the progress of the trial, and not entered on the minutes, to allow the plaintiff, if he recover, to have judgment in gold coin: *Merritt v. Wilcox*, 52 Cal. 238. An attorney of record in an action, which had been sent to a referee by order of court, signed an agreement in writing that the report of the referee should be final, and the agreement was entitled as of the term of the circuit court to which the report was to be made. *Held*, that his client was bound by such agreement: *Brooks v. New Durham*, 55 N. H. 559. An attorney at law released a judgment lien which he had procured in favor of his client in a suit prosecuted by him. The client denied having authorized or ratified the release. The attorney's testimony upon the point was clear and explicit, and strongly fortified by circumstances, to which the client opposed a bare denial, unaccompanied by explanation of the circumstances. *Held*, that the authority must be presumed, although without the scope of the attorney's general employment: *Fritchey v. Bosley*, 56 Md. 94. A's note being in the hands of attorneys for collection, they received from him certain collaterals, consisting of claims on other parties, to be collected by them, and the proceeds applied to the note; and they gave to A their receipt, stipulating that he should not be sued on his note unless the collaterals could not be collected, and reciting that he guaranteed the payment of the collaterals. Suit being brought against A on his note, he pleaded the receipt as a defense, alleging want of diligence on the part of the attorneys in respect of the collection of the collaterals. *Held*, that the attorney's receipt could afford to A no defense to the action; if there was any breach of their contract with him, he had his remedy against them for damages: *Bradford v. Arnold*, 33 Tex. 412.

§ 174. Extent of Authority of Attorney as to Time.—

The contract of an attorney to carry on or defend a suit, or to do any other business, is an entire contract to conduct the suit or business to its termination.¹ The appointment of a person as "permanent solicitor" does not mean an appointment for life.² The appointment of an

¹ 2 Greenl. Ev., sec. 142; *Bathgate* 90; *Langdon v. Castleton*, 30 Vt. 285.
² *Weeks on Attorneys*, sec. 188.

attorney under an agreement that he is to receive a stated amount per year for his services is a contract for a year at least.¹ The authority continues until judgment or other termination of the suit.²

§ 175. Ratification of Unauthorized Acts.—As in other cases of agency, the client may ratify the unauthorized acts of the attorney.³ Where an action is commenced by an attorney at law, without the knowledge or consent of the plaintiff, the plaintiff may afterward ratify the same, and thereafter be entitled to all its benefits.⁴ So a defect in the employment of an attorney to bring a suit for ~~own~~ may be cured by a subsequent ratification.⁵ An unauthorized appearance by an attorney in a case where there has been no personal service on the defendant may be so ratified by payment to the attorney of compensation for his services as to confirm the jurisdiction and validate the judgment.⁶ But the ratification must be made on knowledge of all the facts.⁷ A ratification of an unauthor-

¹ Weeks on Attorneys, sec. 188.

² Jackson v. Bartlett, 8 Johns. 362; Lovo v. Hall, 3 Yerg. 408; Kellogg v. Gilbert, 10 Johns. 220; 6 Am. Dec. 335; Lusk v. Hastings, 1 Hill, 556; Hillegass v. Bender, 78 Ind. 225. The attorney's functions are terminated by the entry of judgment, though void; and the employment of a new attorney to enforce the judgment, and his issuing execution, is a complete substitution, so that service of papers for a stay is properly made on him: Ward v. Sands, 10 Abb. N. C. 60. In Bathgate v. Haskin, 59 N. Y. 533, Andrews, J., said: "The authority of an attorney who is employed to prosecute or defend a suit, in the absence of special circumstances, continues, by virtue of his original retainer, until it is finally determined. The contract of the attorney is entire, and the service he is to render is essentially single, although it may require distinct steps and proceedings on his part before the purpose of the employment is fully

accomplished. No right of action accrues for each successive service in the progress of the cause, and the statute does not begin to run against his claim for compensation until his relation as attorney in the suit has terminated. The client may terminate it at his pleasure, or the attorney may do so after reasonable notice; but in the absence of proof to the contrary, the presumption is that it continues until the litigation has ended."

³ Agency, Chapter VI., *ante*; Taylor v. Sutton, 6 La. Ann. 709; Mason v. Stewart, 6 La. Ann. 736; Brooks v. Poirier, 10 La. Ann. 512; Narraguagus v. Wentworth, 36 Me. 339; Mayer v. Foulkrod, 4 Wash. 511; Johnson v. Cunningham, 1 Ala. 249; King v. Pope, 28 Ala. 601; Marshall v. Moore, 36 Ill. 321.

⁴ Dresser v. Wood, 15 Kan. 344.

⁵ Lisbon v. Holton, 51 N. H. 209.

⁶ Ryan v. Doyle, 31 Iowa, 53.

⁷ Williams v. Reed, 3 Mason, 405.

ized agreement is not proved by the entry of such agreement on the minutes of the court, in a cause to which it relates, in the presence of the party's attorney.¹

ILLUSTRATIONS.— After judgment on a marine policy recovered in the name of E. T., owner of a one-eighth interest, W. T., owner of the other seven eighths, settled with E. T.'s attorney, received the money collected, and promised to pay the assignee in bankruptcy of E. T. his share thereof. *Held*, that W. T. thereby ratified the action of the attorney, and that *assumpsit* for money had and received would lie upon such special promise: *Vose v. Treat*, 58 Me. 378.

¹ *Revis v. Wallace*, 2 Heisk. 658.

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CHAPTER XVI.

LIABILITY OF ATTORNEY TO CLIENT.

- § 176. Duty of attorney to client— Dealings between attorney and client.
- § 177. Duty to render accounts — Mixing money.
- § 178. Duty to notify client of collection of money.
- § 179. Duty to pay over money.
- § 180. Skill required of attorney in his profession — Liable for negligence.
- § 181. Negligence a question of fact.
- § 182. Liability of attorney for mistakes of law.
- § 183. Mistakes in drawing papers and pleadings.
- § 184. Mistakes in prosecution of suit.
- § 185. Mistakes in giving advice.
- § 186. Measure of damages.
- § 187. Attorney must follow client's instructions.
- § 188. Liability of attorney for mistakes or frauds of agents or associates.
- § 189. Liability for acting without authority.
- § 190. Liability for acting in excess of authority.
- § 191. Not liable as to matters outside his profession.
- § 192. Remedy is against attorney alone— Proceedings not affected.
- § 193. Summary jurisdiction as to attorneys.
- § 194. When summary jurisdiction will and will not be exercised.
- § 195. For what acts summary jurisdiction will be exercised.

§ 176. Duty of Attorney to Client—Dealings between Attorney and Client.—The highest degree of good faith is required of an attorney towards his client. "The court, from general principles of policy and equity, will always look into the dealings between attorney and client, and guard the latter from any undue consequences resulting from a situation in which he may be supposed to stand unequal."¹ The rule applicable to transactions between attorney and client is, that the attorney who bargains with his client in a matter of advantage to himself is

¹ *Starr v. Vanderheyden*, 9 Johns. 253; *Mills v. Mills*, 26 Conn. 213; *Bibb v. Smith*, 1 Dana, 582; *Miles v. Ervin*, 1 McCord Ch. 524; 16 Am. Dec. 623; *Jennings v. McConnel*, 17 Ill. 148; *Gray v. Emmons*, 7 Mich. 533; *Williams v. Reed*, 3 Mason, 405; *Tancre v. Reynolds*, 35 Minn. 476. The jurisdiction of charges of fraudulent dealings between attorney and client is in equity: *Broyles v. Arnold*, 11 Heisk. 484.

bound to show that the transaction is fair and equitable, and that the client was fully informed of his rights and interests in the subject-matter of the transaction, and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arms' length.¹ He cannot be allowed to purchase the subject-matter of the suit; the client may set aside such a purchase on discovering it.² Nor can he purchase from the client or take gifts from him.³

§ 177. Duty to Render Accounts—Mixing Money.—

It is the duty of an attorney to render correct accounts to his client,⁴ and he is liable for any loss he may sustain from not paying over his client's money, but mixing it

¹ Kissing v. Shaw, 33 Cal. 425; 91 Am. Dec. 644; Bingham v. Salenc, 15 Or. 208; 3 Am. St. Rep. 152.

² Smith v. Brotherline, 62 Pa. St. 461; Brotherson v. Consalus, 26 How. Pr. 117. A purchase is void which is of an interest in property adverse to a client for whom he is then acting: Cunningham v. Jones, 37 Kan. 477; 1 Am. St. Rep. 257. In Valentine v. Stewart, 15 Cal. 387, the court say: "The true rule is, that an attorney when acting for his client is bound to the most scrupulous faith, to *uberrima fides*. His own interests, for wise reasons, are not allowed to be brought in collision with the interests of his client. There can be no antagonism between these parties as to the matters of this delicate agency; the attorney is simply the representative of his client, — not his rival or competitor, — acting for the principal, not for himself. Very little knowledge of human nature is required to convince us that if the law allowed the attorney to deal with the principal as he might with a stranger, these responsible trusts, upon which the interests of society so much depend, would be turned into means of the grossest fraud and oppression. The law has, therefore, prescribed strict rules of restraint upon the action of the attorney, and will never permit him to take advantage of his position to speculate upon the inter-

ests which are intrusted to him. Even in the case of a purchase of the subject of the suit by the attorney, the client may set it aside at his pleasure, unless the attorney show by clear and conclusive proof that no advantage was taken, that everything was explained to the client, and that the price was fair and reasonable. But no case has come to our knowledge where an attorney has been permitted, after once acting as such in the prosecution of a suit, and having opportunities for knowing the facts of his client's case, to go over and render assistance to the adverse side, and enforce in a court of equity the contract based on such acts or the agreement to do them."

³ Weeks on Attorneys, secs. 273, 281. An attorney at law is bound to observe the utmost good faith towards his client on purchasing property from him, and to draught all papers pertaining to the transaction, with such care and skill that they shall express the real understanding of the parties: Payne v. Avery, 21 Mich. 524. To sustain a gift from a client to his attorney, the burden is upon the latter to show, not only that it is voluntary, but also that it is made with full knowledge of all material facts known to him, and without undue influence: Whipple v. Barton, 63 N. H. 613.

⁴ Weeks on Attorneys, secs. 262, 282; Scott v. Wickliffe, 1 B. Mon. 353.

with his own.¹ If important papers, upon which the client's liberty depends, are intrusted to an attorney, he should not only return them when the relation of attorney and client ceases, but should not willfully do anything by which another can gain information concerning such papers, to be used to the client's injury. If the client discharges the attorney without paying him, and employs another, that does not alter the case.² Persons depositing notes with attorneys for collection have a right to demand and have an accounting, to know the condition of the claims, and to receive the amounts collected, subject only to just exceptions.³

ILLUSTRATIONS.— A complaint alleged that the plaintiff, together with another party, had placed in the hands of the defendant, for collection, a large amount of claims; that these claims were all collectible, but were unaccounted for by the defendant, who had refused to render any account thereof to the plaintiff upon his demand. *Held*, that the plaintiff could not recover of the attorney the value of the notes, or the notes themselves, but that he was entitled to an accounting, and to receive any money that had been collected: *Bougher v. Scobey*, 23 Ind. 583. A woman employed an attorney to collect the interest on a third mortgage for \$8,000. The mortgagor failed. The woman sold the mortgage to the attorney for \$975, and on her expressing dissatisfaction afterwards, he gave her \$900 more, she first having unsuccessfully tried, with his consent, to find another purchaser. He afterwards realized \$2,325 on the mortgage. *Held*, that he should be required to account to her for this amount: *Dunn v. Dunn*, 42 N. J. Eq. 431.

§ 178. Duty to Notify Client of Collection of Money.—

It is the duty of the attorney to immediately notify the client when money has been collected by him, and await the client's instructions.⁴

§ 179. Duty to Pay over Money.— Likewise it is the attorney's duty to at once pay over to the client money

¹ *Robinson v. Ward*, 1 Ryan & M. 274.

² *Bougher v. Scobey*, 23 Ind. 583.

³ *Weeks on Attorneys*, sec. 263;

⁴ *In re Hahn*, 11 Abb. N. C. 423.

Denton v. Embury, 10 Ark. 223.

received for him.¹ If he has notified the client of the receipt of the money, the latter has no cause of action against him for the sum, until after a demand and refusal.² Declarations of the attorney that he intends to retain money collected by him, to indemnify himself for a fraud committed on him by the plaintiff, do not dispense with the necessity of a demand, unless made to the plaintiff's agent, or brought to his knowledge before suit commenced.³ But an engagement to pay it over, when collected, to a third party, and a failure to do so, dispenses with demand.⁴ An attorney who has collected money is not liable to the nominal claimant, if the claim were handed by him to the actual client, and the attorney has paid it over to him without notice.⁵ The promise of an attorney at law, who has received a debt for collection,

¹ Weeks on Attorney, secs. 264, 308.

² *Mardis v. Shackelford*, 4 Ala. 493; *Jett v. Hempstead*, 25 Ark. 462; *Rathbun v. Ingalls*, 7 Wend. 320; *Taylor v. Bates*, 5 Cow. 376; *Cummins v. McLain*, 2 Ark. 402; *Denton v. Embury*, 10 Ark. 228; *Black v. Hersch*, 18 Ind. 342; 81 Am. Dec. 362; *Beardsley v. Boyd*, 37 Me. 180; *Satterlee v. Frazer*, 2 Sand. 141; *Walradt v. Maynard*, 3 Barb. 534; *Voss v. Bachop*, 5 Kan. 59; *Roberts v. Armstrong*, 1 Bush, 263; 89 Am. Dec. 624; *Krause v. Dorrance*, 10 Pa. St. 462; 51 Am. Dec. 496, the court saying: "An attorney is not liable to suit for money collected for another, till demand or direction to remit. As is said in one of the cases, he is not considered in default until he receives orders from his principal. This principle seems to be well settled in several states, including New York, Virginia, Alabama, and Arkansas, as may be seen from the following cases: *Taylor v. Bates*, 5 Cow. 376; *Ex parte Ferguson*, 6 Cow. 596; *Rathbun v. Ingalls*, 7 Wend. 320; *Taylor v. Armistead*, 3 Call, 200; *Cummins v. McLain*, 2 Ark. 402; and *Mardis v. Shackelford*, 4 Ala. 493. In Maine it has been ruled by the same judge in both ways: *Staples v. Staples*, 4 Greenl. 532; and *Coffin v. Coffin*, 7 Greenl. 298. This is a case of the

first impression in this state, but we feel disposed to follow the current of decisions, for we agree that for a client to sue his attorney for money collected, without notice, would be very harsh, if not reprehensible, conduct; and for this reason it is that this is the first time the point has arisen in this state, for no counsel would be so unconscientious to a brother as to sue him without demand. It is, perhaps, but an act of justice to the attorney to state, that, although not proved, yet he alleges notice was given before the commencement of the suit. The point is not of much practical importance, as the case will seldom arise, and never unless there are some improper feelings to gratify. But although the general rule be as stated, it is not without exception, for circumstances may exist which will dispense with the necessity of a demand; as, when the attorney has been guilty of fraud or malpractice, or of culpable negligence in not giving notice of the receipt of the money in a reasonable time; or when he puts in a sham plea for delay; or when he exhibits a manifest desire to baffle the plaintiff, and withhold from him his just demand."

³ *Rathbun v. Ingalls*, 7 Wend. 320.

⁴ *Mardis v. Shackelford*, 4 Ala. 493.

⁵ *Penny v. Caldwell*, 1 Bail. 345.

to pay the amount of his debt upon his ultimate failure to collect it, if supported by a sufficient consideration, is valid and binding; but the mere confidence in the advice of the attorney, or acquiescence in the course he wished to pursue in the matter, would not be sufficient to support an action upon the promise; but if the client should agree not to withdraw the business from the hands of the attorney, or consent, on the faith of such promise, to waive a proceeding which otherwise he would have taken, and by reason of which his debt would have been secured, it would be otherwise.¹ An attorney is liable as garnishee of his principal, after the money is collected, though it has not been demanded.² Where an attorney deposits his client's moneys in a solvent bank in his own name in a separate account, but with no indication of the trust, he is liable for loss by the subsequent insolvency of the bank, notwithstanding he was prevented from transmitting the moneys by garnishment proceedings against him.³

ILLUSTRATIONS. — An attorney, in whose hands a note was placed for collection, received part payment thereof, after action commenced, and nevertheless took judgment for the whole amount of the note, on default of the promisor. *Held*, that the latter might recover of the attorney the money so paid, though the attorney had paid it over to the creditor: *Fowler v. Shearer*, 7 Mass. 14. An attorney collected money for the defendant, and remitted the amount by the draft of one bank on another, payable to the attorney's order, and indorsed by him. The defendant received the money, and directed the attorney "to send the balance in the same way." The attorney sent another sum in the same manner. The draft was received by the defendant, but before it could be collected the drawer failed, and it was not paid. *Held*, that the attorney was not liable as indorser: *Kimmell v. Bittner*, 62 Pa. St. 203. An attorney, having collected a claim, deducted his fees, and deposited the balance in a bank, which was then solvent and in good standing, to the credit, not of his private account, but

¹ *Morrill v. Graham*, 27 Tex. 646.

² *Naltner v. Dolan*, 108 Ind. 500; 58

³ *Staples v. Staples*, 4 Me. 533; *Am. Rep.* 61.

Thayer v. Sherman, 12 Mass. 441.

of an account called the collection account, to the credit of which he was in the habit of depositing all moneys collected for clients. The name of the client for whose benefit the deposit was made was entered in the bank-book opposite the entry of the deposit. The client neglected to call for his money for some years, and until after the bank had become insolvent. *Held*, that the attorney was not liable for the money so deposited and lost: *Pidgeon v. Williams*, 21 Gratt. 251.

§ 180. Skill Required of Attorney in his Profession — Liable for Negligence.—An attorney is responsible to his client for the want of ordinary skill and care, and reasonable diligence, in the management of his affairs.¹ The want of ordinary care and skill, it is said, is gross negligence,² and therefore it is held that an attorney is liable only for gross ignorance or gross negligence in the performance of his professional duties.³ The authorities seem to agree that where a client has suffered damage through the gross negligence or gross ignorance of his attorney, he has a right of action against him for the damages sustained.⁴

¹ *Montrieu v. Jefferys*, 2 Car. & P. 113; *Wilson v. Russ*, 20 Me. 421; *Weimer v. Sloane*, 6 McLean, 259; *Ex parte Giberson*, 4 Cranch C. C. 503; *Cox v. Sullivan*, 7 Ga. 144; 50 Am. Dec. 386; *O'Barr v. Alexander*, 37 Ga. 195; *Holmes v. Peck*, 1 R. I. 242; *Wilcox v. Plummer*, 4 Pet. 173; *Wynn v. Wilson*, Hemp. 698; *Bowman v. Tallman*, 27 How. Pr. 212; *Gambert v. Hart*, 44 Cal. 542; *Gallaher v. Thompson*, Wright, 466; *Stevens v. Walker*, 55 Ill. 151; *Watson v. Muirhead*, 57 Pa. St. 161; 98 Am. Dec. 213. In *Godefroy v. Dalton*, 6 Bing. 467, 4 Moore & P. 149, Tindal, C. J., explained the rule of an attorney's liability with much clearness: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in

general, that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. But, on the other hand, he is not answerable for error in judgment, upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law."

² *Weeks on Attorneys*, sec. 285; *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262.

³ *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262; *Evans v. Watrous*, 2 Port. 205.

⁴ *Hopping v. Quin*, 12 Wend. 517; *Estate of A. B.*, 1 Tuck. 247; *Hatch v. Fogerty*, 10 Abb. Pr., N. S., 147; *Eggleston v. Boardman*, 37 Mich. 14; *Morrill v. Graham*, 27 Tex. 647; *Sevier v. Holliday*, 2 Ark. 512; *Palmer v. Ashley*, 3 Ark. 75; *Wilson v. Russ*, 20 Me. 421; *Evans v. Watrous*, 2 Port.

The undertaking implied by the law, from a person's engaging in the business of searching the public records, examining titles to real estate, and making abstracts thereof, for compensation, is, that he possesses the requisite knowledge and skill, and will use due and ordinary care in the performance of the duty. For a failure in either of these respects, resulting in damages, the party injured is entitled to recover.¹ An attorney employed to examine a land title cannot set up, in defense to an action for damages for his negligence in overlooking a lien on such lands, that such lien was erroneous or of doubtful validity.² An attorney employed to record a mortgage, but who neglects to do so until after other subsequent encumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default.³ If the attorney of a judgment defendant receives money to pay the judgment, and pays it over to the clerk of the court, he is not liable for the insolvency of the clerk;⁴ that the plaintiff continued to employ him after knowing of such negligent conduct is relevant on the question of damages.⁵ A contract by an attorney to save his client harmless from all responsibility in a suit pending against him, or to refund his fee, con-

205; *O'Barr v. Alexander*, 37 Ga. 195; *Caverley v. McOwen*, 123 Mass. 574; *Gleason v. Clark*, 9 Cow. 58; *Wilson v. Coffin*, 2 Cush. 316; *Hastings v. Halleck*, 13 Cal. 203; *Nisbet v. Lawson*, 1 Ga. 275; *Cox v. Sullivan*, 7 Ga. 144; 50 Am. Dec. 386; *Holmes v. Peck*, 1 R. I. 242; *Suydam v. Vance*, 2 McLean, 99; *Reilly v. Kavanaugh*, 29 Ind. 435; *Mardis v. Shackelford*, 4 Ala. 493; *Walker v. Scott*, 13 Ark. 644; *Stevens v. Walker*, 55 Ill. 151; *Chase v. Heaney*, 70 Ill. 268. In *Bowman v. Tallmann*, 27 How. Pr. 274, it is said: "There is no implied agreement in the relation of counsel and client, or in the employment of the former by the latter, that the former will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sus-

tained by a court of last resort. . . . He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit. . . . It is not enough that doubts may be raised of the soundness of his opinion or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course or opinion in the mind of every member of his profession of ordinary skill, sagacity, and prudence, caused by a decisiveness of reason and authority in its favor."

¹ *Chase v. Heaney*, 70 Ill. 265; *Ran-kin v. Schaeffer*, 4 Mo. App. 108.

² *Gilman v. Hovey*, 26 Mo. 280.

³ *Miller v. Wilson*, 24 Pa. St. 114.

⁴ *Hillegass v. Bender*, 78 Ind. 225.

⁵ *Derrickson v. Cady*, 7 Pa. St. 27.

ceding it to be valid, extends only to such liabilities as the law would recognize or enforce; and if the client suffers a judgment to be rendered against him in favor of another attorney whom he never had employed, for professional services in the same suit, he cannot resort to his contract of indemnity.¹ In England, while attorneys are responsible to their clients for negligence, counsel or barristers are not. In the United States this distinction does not exist.² The negligence of the client does not affect the liability of the attorney.³

ILLUSTRATIONS.—Plaintiff handed to certain attorneys claims against a bankrupt, "to file against the estate, and to obtain any dividend that may be allowed on the same." *Held*, that this did not show a special contract to resist the bankrupt's discharge, and that the attorneys were entitled to use their discretion in withdrawing such resistance: *Bennett v. Phillips*, 57 Iowa, 174. A person having title papers to land placed in his hands as agent and attorney, with authority to effect a sale of the land, intrusted the papers to a third person for examination, and with a view of making a sale to him. The party so intrusted with the papers, being charged with some crime, absconded and took the papers with him. *Held*, that this act of the agent, which resulted in a loss of the papers, was not negligence on his part so as to impose any liability on him therefor: *Stanberry v. Moore*, 56 Ill. 472.

§ 181. Negligence a Question of Fact.—Whether the conduct of the attorney in a particular case is or is not gross negligence, is a question to be determined in each case by the jury on the evidence.⁴ In California, however, the facts being ascertained, the question of negligence is one of law for the court.⁵

§ 182. Liability of Attorney for Mistakes of Law.—An attorney is not liable for a mistake in a point of law which

¹ *Lindsey v. Jones*, 23 Ala. 835.

² *Weeks on Attorneys*, sec. 289.

³ *Cox v. Sullivan*, 7 Ga. 144; 50 Am. Dec. 386.

⁴ *Walker v. Goodman*, 21 Ala. 647; *Evans v. Watrous*, 2 Port. 205; Pen-

nington v. Yell, 11 Ark. 212; 52 Am. Dec. 262; *Dearborn v. Dearborn*, 15

Mass. 315; *Walpole v. Carlisle*, 32 Ind. 415.

⁵ *Gambert v. Hart*, 44 Cal. 542.

is in doubt, or for a wrong construction of a doubtful statute.¹ So, as observed in the supreme court of the United States, an attorney cannot be charged with negligence when he accepts, as a correct exposition of the law, a solemn decision of the supreme court of the state.² An error of judgment upon a doubtful question of the construction of a statute is not evidence of a want of skill or of negligence.³ Where a father, whose minor son has received injuries through the negligence of a third party, employs counsel to sue him for damages, no legal obligation is, in the absence of an express understanding, imposed on said counsel to bring suit in the name of the father as well as in that of the son. Particularly so, where the right of recovery is uncertain, and where the father, after the suit in the son's name is brought, makes no complaint of the omission to sue in his name also.⁴ An attorney employed to draw a building contract is not delinquent in the performance of his duty if he does not file the contract so as to prevent liens from attaching, especially if he is an attorney of another state than that where the building is to be erected.⁵ And a conveyancer is not liable for passing a title with an encumbrance when in his opinion the encumbrance was not legally a lien, though it turns out otherwise.⁶ An attorney is liable

¹ *Morrill v. Graham*, 27 Tex. 646; *Crosbie v. Murphy*, 8 I. R. C. L. 301; *Elkington v. Holland*, 9 Mees. & W. 658; *Bulmer v. Gilman*, 4 Man. & G. 108.

² *Marsh v. Whitmore*, 21 Wall. 178; *Hastings v. Halleck*, 13 Cal. 203.

³ *Caverly v. McOwen*, 123 Mass. 574; *Bulmer v. Gilman*, 4 Man. & G. 108.

⁴ *Youngman v. Miller*, 98 Pa. St. 196.

⁵ *Fenaille v. Coudert*, 44 N. J. L. 286.

⁶ *Watson v. Muirhead*, 57 Pa. St. 161; 98 Am. Dec. 213. In this case it was said: "The business of a conveyancer is one of great importance and responsibility. It requires an ac-

quaintance with the general principles of the law of real property, and a large amount of practical knowledge, which can only be derived from experience. In England, it has been pursued by lawyers of the greatest eminence. As our titles become more complex with the increase of wealth, and the desires which always accompany it to continue it in our name and family as long as the law will permit, it will become more and more necessary that gentlemen prepared by a course of liberal education and previous study should devote themselves to it. There have been and still are such among us. The rule of liability for errors of judgment as applied to them ought to be the same as in the case of gentlemen

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for mistakes of well-known principles and rules of law;¹ as, that a note is not due until the expiration of the three days of grace, and cannot be sued on before that.² So the disregard of a plain statutory provision is negligence for which the attorney is liable.³

§ 183. Mistakes in Drawing Papers and Pleadings. —

He is liable for mistakes negligently made in drawing papers and pleadings;⁴ as, for suing for twelve dollars instead of twelve hundred.⁵ But he cannot be held liable for his mistake in misdescribing land on which he was employed to enforce his client's lien, if, notwithstanding, it does not appear that his client has sustained damage.⁶

in the practice of law or medicine. It is not a mere art, but a science. 'That part of the profession,' said Lord Mansfield, 'which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. . . . A counsel may mistake as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. . . . Not only counsel, but judges, may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in case of a reasonable doubt': *Pitt v. Yalder*, 4 Burr. 2060. The rule declared by Lord Mansfield has been followed in all the subsequent cases. 'No attorney,' said Abbott, C. J., 'is bound to know all the law; God forbid it that should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into': *Montrieux v. Jefferys*, 2 Car. & P. 113; and see *Godefroy v. Dalton*, 6

Bing. 460; *Kemp v. Burt*, 4 Barn. & Adol. 424; *Gilbert v. Williams*, 8 Mass. 51; 5 Am. Dec. 77."

¹ *Goodman v. Walker*, 30 Ala. 482; 68 Am. Dec. 134; *Morrill v. Graham*, 27 Tex. 646.

² *Hopping v. Quin*, 12 Wend. 518. In *Goodman v. Walker*, *supra*, Stone, J., said: "I lay down the rule, then, for the determination of this case as follows: If the law governing the bringing of this suit was well and clearly defined, both in the text-books and in our own decisions, and if the rule had existed and been published long enough to justify the belief that it was known to the profession, then a disregard of such rule by an attorney at law renders him accountable for the losses caused by such negligence or want of skill; negligence, if knowing the rule he disregarded it; want of skill, if he was ignorant of the rule."

³ *Caverley v. McOwen*, 123 Mass. 575; *Estate of A. B.*, 1 Tuck. 236.

⁴ *Varnum v. Martin*, 15 Pick. 440; *Rootes v. Stone*, 2 Leigh, 650; *Reilly v. Kavanaugh*, 29 Ind. 435; *Oldham v. Sparks*, 28 Tex. 425; *Fitch v. Scott*, 3 How. (Miss.) 314; 34 Am. Dec. 86. See *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213, as to conveyances.

⁵ *Varnum v. Martin*, 15 Pick. 440.

⁶ *Joy v. Morgan*, 35 Minn. 184.

ILLUSTRATIONS.—An attorney, who was also a notary public, was held liable for neglect in not recording a mortgage which he had drawn for his client, and agreed to deliver to the recording officer: *Stott v. Harrison*, 73 Ind. 17.

§ 184. **Mistakes in Prosecution of Suit.**—It is negligence in an attorney to bring an action too soon,¹ or to neglect to bring it until too late to recover,² or to bring it in a wrong county,³ or in a court which has not jurisdiction of the suit,⁴ or to improperly dismiss a suit.⁵ He is liable for neglect in prosecuting a motion for a new trial, whereby it is not finally awarded to his client.⁶ It is the duty of the attorney employed to collect a debt to sue out all the necessary process to enforce the claim, and for a failure to do so he is liable to the client.⁷ Thus he

¹ *Hopping v. Quin*, 12 Wend. 518.

² *Smodes v. Elmendorf*, 3 Johns. 185; *Oldham v. Sparks*, 28 Tex. 425; *Walsh v. Shumway*, 65 Ill. 471; *Stevens v. Walker*, 55 Ill. 151. To support an action against an attorney for the amount of bills left with him for collection, where nothing has been collected on them, it is necessary to show culpable negligence in collecting: *Palmer v. Ashley*, 3 Ark. 75.

³ *Kemp v. Burt*, 4 Barn. & Adol. 424.

⁴ *Williams v. Gibbs*, 5 Ad. & E. 208.

⁵ *Evans v. Watrous*, 2 Port. 205; *Coopwood v. Baldwin*, 25 Miss. 129; *Walpole v. Carlisle*, 32 Ind. 415.

⁶ *Drais v. Hogan*, 50 Cal. 121.

⁷ *Crooker v. Hutchinson*, 2 D. Chip. 117; *McWilliams v. Hopkins*, 4 Rawle, 382; *Fitch v. Scott*, 3 How. (Miss.) 314; 34 Am. Dec. 86; *Hogg v. Martin*, Riley, 156; *Wright v. Ligon*, Harp. Eq. 137; *Stevens v. Walker*, 55 Ill. 151; *Smallwood v. Norton*, 20 Me. 83; 37 Am. Dec. 39; *Cox v. Sullivan*, 7 Ga. 144; 50 Am. Dec. 386. In *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262, a leading case on the liability of the attorney, the court say: "As authority and duty in the relation of client and attorney are correlative terms, in the same sense that right and obligation are so, in a general sense, it results from the

law as it now stands, that when an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object; and consequently, that he must not only sue out the first process of execution, but all such that may become necessary. This undoubtedly is the true general doctrine on this subject, qualified, however, as will be presently seen, by a pervading principle that fairly grows out of the peculiar character of the attorney's functions. But although it is his duty thus to pursue his client's cause through all its stages, he is not imperiously bound to institute new collateral suits, without special instructions to do so; as, actions against the sheriff or clerk for the failure of their duty in the issuance or service of process. He should pursue bail, however, and those who may have become bound with the defendant, either before or after judgment, in the progress of the suit. Nor is he bound to attend in person to the levy of an execution, or to search out for property out of which to make the debt, this is the business of the sheriff. Nor is he liable for any of the shortcomings of that officer. But in reference to all these professional duties, the courts have recognized a principle to which we have already alluded, that does

is liable for a failure to seasonably sue out a *scire facias* where the execution has been returned *non est inventus*,¹ for not delivering an execution to the officer within thirty days after judgment, if an attachment is lost thereby.² He is not liable for the loss of papers stolen from him without negligence on his part.³ He is not guilty of negligence in forbearing to bring a suit where the parties had agreed to leave one of the matters in dispute to arbitration, the decision of which would render an action unnecessary;⁴ nor in failing to pursue the extraordinary remedy of attachment, the owner of the claim having neither made affidavit nor given bond;⁵ nor for omitting to defend a suit, if he be not instructed in the defense;⁶ nor is he liable for a failure to file a note which he has received for collection by suit; as, a claim against the estate of the maker upon the death and declaration of the insolvency of the estate of the latter, when such facts occurred after he received the note, and without his knowledge.⁷ Where an attorney is directed to collect a note containing no waiver of the appraisal laws, and obtains a judgment with such waiver, the client cannot complain, although the debtor's property sold for much

not by any means move the line between reasonable diligence and *crassa negligentia*, and thus in fact place the attorney farther from responsibility to his client; but so far as its operation is in any sort to his protection, it is so only by its influence upon the determination of the question of fact, whether or not the act or omission complained of did really amount to that degree of crassitude for which the law holds him liable. This principle is, that the attorney will always be justified in ceasing to proceed with his client's cause (unless specially instructed to go on) whenever he shall be *bona fide* influenced to this course by a prudent regard for the interest of his client: *Crooker v. Hutchinson*, 2 D. Chip. 117; 2 Greenl. Ev., 2d ed., sec. 145, p. 140. This principle would seem to grow di-

rectly out of the peculiar character of the functions of an attorney at law, and to be founded on sound public policy; for in the nature of things these duties cannot in general be performed in a manner to subserve the true interest of the client, if limited to that strict line of routine conduct which is chalked out by the law as the pathway for ordinary agents, and it is therefore inevitable that in the discharge of these duties they must be intrusted with a large and liberal share of discretion."

¹ *Dearborn v. Dearborn*, 15 Mass. 316.

² *Phillips v. Bridge*, 11 Mass. 246.

³ *Hill v. Barney*, 18 N. H. 607.

⁴ *Hogg v. Martin*, Riley, 156.

⁵ *Foulks v. Falls*, 91 Ind. 315.

⁶ *Benton v. Craig*, 2 Mo. 198.

⁷ *Stubbs v. Beene*, 37 Ala. 627.

less than its value, and the whole amount of the judgment was not realized.¹

ILLUSTRATIONS.—A demand against persons known to be insolvent was left with an attorney, with instructions to do the best he could with it. He received the notes of third persons for the debt, but in consequences of the fraud of the debtors, such notes were not collected. *Held*, that the attorney was not responsible for the loss, and a judgment obtained against him at law was restrained by injunction: *Wright v. Ligon*, 1 Harp. Eq. 166. An attorney employed to prosecute a suit for the recovery of valuable land, when a jury had returned a verdict in his favor, took the same, and by his negligence and unskillfulness altered the verdict so as to include only a worthless piece of the property sought to be recovered; and at his request the jury accepted the same as their verdict, to the plaintiff's damage. *Held*, that the attorney is liable: *Skillen v. Wallace*, 36 Ind. 319. An attorney is employed to conduct a case in the district court, and a judgment is rendered against his client, and he is entitled to a new trial and obtains one, but conducts the proceedings in obtaining the new trial so carelessly and negligently that the order granting the same is reversed in the supreme court: *Held*, that he is liable to the client for the loss sustained thereby, and his liability is not destroyed by the fact that his client employed other counsel in the supreme court: *Drais v. Hogan*, 50 Cal. 121.

§ 185. Mistakes in Giving Advice.—The attorney is liable where he gives to the client plainly erroneous advice, from which the client, by following, is damaged.²

§ 186. Measure of Damages.—The client must have suffered an injury, or he cannot maintain an action even for nominal damages.³ "Two things are to be shown in order to subject an attorney to an action: 1. Gross or unreasonable negligence or ignorance; and 2. A consequent loss to his client."⁴ The measure of damages is the actual loss sustained,⁵ and not necessarily the amount

¹ *Nickless v. Pearson*, 81 Ind. 427.

² *Gihon v. Albert*, 7 Paige, 278.

³ *Grayson v. Wilkerson*, 13 Miss. 268; *Suydam v. Vance*, 2 McLean, 99; *Harter v. Morris*, 18 Ohio St. 492; *Arnold v. Robertson*, 3 Daly, 298; *Bruce v. Baxter*, 7 Lea, 477.

⁴ *Fitch v. Scott*, 3 How. (Miss.) 314; 34 Am. Dec. 86.

⁵ *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262; *Stevens v. Walker*, 55 Ill. 151; *Rootes v. Stone*, 2 Leigh, 650; *Crooker v. Hutchinson*, 2 D. Chip. 117; *Nisbet v. Lawson*, 1 Ga. 275; *Cox*

of the claim which was not recovered, through the negligence of the attorney.¹ The client must show that he had a valid claim.² An attorney is liable to his client only for the proximate results of neglect in making collections. If, after the client took the business from the hands of the attorney, loss resulted from further delay of the client, or of another attorney into whose hands the collections were given, the first attorney cannot be held responsible for such loss.³ An attorney, liable for a debt lost by his negligence, is not liable for the loss of the evidence of the debt; and in a suit against him for such loss, he may show that the plaintiff had another remedy, which he had successfully pursued.⁴ The amount of damages is a question for the jury.⁵

ILLUSTRATIONS. — A places certain demands in the hands of an attorney, who agrees to collect the amount, and pay over the proceeds to creditors of A, such creditors being no party to the agreement. *Held*, that A may maintain an action against the attorney for a failure to collect and pay over the amount of the debts: *Mardis v. Shackleford*, 6 Ala. 433.

§ 187. Attorney must Follow Client's Instructions.—

The attorney must follow the instructions of his client. "Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible."⁶ As to the general conduct of the suit,

v. Sullivan, 7 Ga. 144; 50 Am. Dec. 386; *Mardis v. Shackleford*, 4 Ala. 493; *Eccles v. Stephenson*, 3 Bibb, 517; *Arnold v. Robertson*, 3 Daly, 298; *Suydam v. Vance*, 2 McLean, 99; *Grayson v. Wilkinson*, 5 Smedes & M. 268; *Langmade v. Glenn*, 57 Ga. 528. In *Wilcox v. Plummer*, 4 Pet. 172, it is said: "When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur, and grow

out of the injury, even up to the day of the verdict."

¹ *Eccles v. Stephenson*, 3 Bibb, 517; *Crooker v. Hutchinson*, 2 D. Chip. 117; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

² *Spiller v. Davidson*, 4 La. Ann. 171; *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262.

³ *Read v. Patterson*, 11 Lea, 430.
⁴ *Huntington v. Rumnill*, 3 Day, 390.

⁵ *Golefroy v. Jay*, 5 Moore & P. 284; *Crooker v. Hutchinson*, 2 D. Chip. 117; *Eccles v. Stephenson*, 3 Bibb, 517.

⁶ *Gilbert v. Williams*, 8 Mass. 51; 5 Am. Dec. 77; *Nave v. Baird*, 12 Ind. 318; *Wilcox v. Plummer*, 4 Pet. 172;

the attorney acts according to his judgment and discretion. In these matters the client has no right to control him; he may do what he thinks is proper, even though against the wishes of the client.¹

ILLUSTRATIONS.—The holder of a note places it in the hands of an attorney, and instructs him to bring suit on it. The attorney, honestly believing that it would be better not to sue then, omits to do so, and the money is lost by the maker's subsequent insolvency. The attorney is liable to an action by the client: *Cox v. Livingston*, 2 Watts & S. 103; 37 Am. Dec. 486.

§ 188. Liability of Attorney for Mistakes or Frauds of Agents or Associates.—An attorney is liable for the negligence or fraud of another attorney whom he employs as his agent.² So each partner in a firm of attorneys is liable for the want of skill or negligence of the others.³ For like reasons, a mercantile collecting agency receiving a note "for collection" is liable for the negligence of attorneys or agents employed by them in other parts of the country.⁴ An attorney who has collected money for his

Cox v. Livingston, 2 Watts & S. 103; 37 Am. Dec. 486; *Armstrong v. Craig*, 18 Barb. 387.

¹ *Anonymous*, 1 Wend. 108; *Read v. French*, 28 N. Y. 292.

² *Weeks on Attorney*, sec. 288; *Riddle v. Poorman*, 3 Penr. & W. 224; *Poole v. Gist*, 4 McCord, 259; *Walker v. Stevens*, 79 Ill. 193; *Smallwood v. Norton*, 20 Me. 83; 37 Am. Dec. 39; *Pollard v. Rowland*, 2 Blackf. 22; *Grayson v. Wilkinson*, 5 Smedes & M. 238; *Birkbeck v. Stafford*, 14 Abb. Pr. 285; *Cummins v. Heald*, 24 Kan. 600; 36 Am. Rep. 264.

³ *Livingston v. Cox*, 6 Pa. St. 360; *Dwight v. Simon*, 4 Ia. Ann. 490; *Poole v. Gist*, 4 McCord, 259; *Wilkinson v. Griswold*, 12 Smedes & M. 669.

⁴ *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665, *Agnew, J.*, saying: "It is argued, notwithstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspond-

ence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions, we must conclude that the public impression will be that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents when it undertakes the collection by

client will, if he deliver it to a third person to carry to his client, without authority or directions from the client so to do, be liable to his client for the sum thus collected if the same be stolen from such third person while on his way with the money, even though such person were trustworthy, and took the same care of the money that he did of his own.¹

ILLUSTRATIONS.—An attorney, directed by a mortgagee of certain horses and harnesses to take possession of them under the mortgage, went with an officer to the stable where they were, and took possession of them. The stable was then leased from the mortgagor, and a custodian selected by the mortgagee was placed in charge of the property. *Held*, that the attorney was not liable for the custodian's neglect in permitting the property to be afterwards seized under an execution: *Gaines v. Becker*, 7 Ill. App. 315.

§ 189. Liability for Acting without Authority.—If an attorney commence or defend an action or suit without authority, he is liable to the principal for damages.² An action for money had and received will lie against an attorney who, having a debt to collect, receives in payment debts of himself or of others, without authority from his principal.³

§ 190. Liability for Acting in Excess of Authority.—So the attorney is liable to his client for damages arising

the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of *Bullitt v. Baird*, decided at Philadelphia in 1870, the only case in this state upon the subject of such agencies. There the receipt read, 'For collection according to our direction, and proceeds, when received by us, to be paid over to King and Baird.' Across the face of the receipt was printed these words: 'N. B. The owner of the within mentioned taking all the risks of the mail, of losses by failure of agents to remit, and also

of losses by reason of insurrection or war.' The limitation of the liability of Bullitt and Fairthorn by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction."

¹ *Grayson v. Wilkinson*, 13 Miss. 268.

² *Weeks on Attorneys*, sec. 303; *Cyphert v. McClune*, 22 Pa. St. 195; *O'Hara v. Brophy*, 24 How. Pr. 379; *Piggott v. Addicks*, 3 G. Greene, 427; 56 Am. Dec. 547; *Marvel v. Manouvrier*, 14 La. Ann. 3; 74 Am. Dec. 424; *Dorsey v. Kyle*, 30 Md. 512; 96 Am. Dec. 617.

³ *Houx v. Russell*, 10 Mo. 246.

to the latter through his acting in excess of his authority.¹ An attorney entering satisfaction of a judgment without full payment is personally liable to his client for the unpaid balance.²

ILLUSTRATIONS.—Attorneys collected and transmitted to their clients funds in depreciated bank paper, which the clients refused to receive, and sent back with an order to return to them, and a request to make up the difference. The attorneys declined to do anything about it. *Held*, that the clients had a right to sell the paper and recover the deficiency from the attorneys: *West v. Ball*, 12 Ala. 240.

§ 191. Not Liable as to Matters outside his Profession.

—An attorney is not liable for not acting as to matters not implied in the business of an attorney, or not within the scope of the profession; as, for example, demanding payment of a note and giving notice to the indorser.³

§ 192. Remedy is against Attorney Alone—Proceedings not Affected.—The remedy of the client is against

¹ Weeks on Attorneys, sec. 305.

² *People v. Cole*, 84 Ill. 327.

³ *Odlin v. Stetson*, 17 Me. 244; 35 Am. Dec. 248; *Hughes v. Boyce*, 2 La. Ann. 803. In *Odlin v. Stetson*, 17 Me. 244, 35 Am. Dec. 248, the court said: "When a person offers his services to the public in any business, trade, or profession, there is an implied engagement with those who employ him that he will perform the business intrusted to him faithfully, diligently, and skillfully. And if he fails to do so, he is answerable for the damages suffered by reason of such neglect. This engagement is limited, however, by the nature of the business, and often also by its being carried on only in a particular place. Thus an insurance or ship broker resident in a certain city would not be expected to effect insurance or obtain a freight in a distant city, unless such were proved to be his usual course of business, without a special undertaking to do it. So a notary cannot be expected to perform the duties of an attorney, or an attorney those of

a notary, without some special engagement, unless there be proof of a combination of these employments, or of a course of business authorizing those employing him to expect that he will do so. The case finds that the defendants were not notaries; and it does not appear that they had so conducted their business as to authorize any one to expect them to act in any other character or manner than is usual for attorneys. The court must understand from the law, and from the customary course of business as exhibited in cases coming before them, that negotiable paper is placed in the hands of a notary or special agent to have the necessary presentment made and notices given. Cases may and do occur, where an attorney acts also as a notary, and where also an attorney is called upon for advice respecting the manner of performing these duties; and he may in such and probably in other cases undertake to have them properly done, and in such cases he will be responsible."

the attorney alone. His negligence or ignorance, whereby the client fails in his suit, cannot, as a rule, be made a ground for setting aside the judgment or decree.¹ In New York it has been held that a judgment obtained by default through the neglect of the defendant's attorney will be set aside, where it appears that the attorney is insolvent, and the client otherwise would be remediless.²

§ 193. **Summary Jurisdiction as to Attorneys.**—As officers of the court, attorneys are peculiarly subject to its jurisdiction. The tribunals in which they practice exercise a summary authority over them, whenever it is discovered that they have been guilty of bad faith or want of honesty in their dealings with either court or client. This summary jurisdiction extends not merely to cases in which the attorney is actually employed, but "whenever the employment is so connected with their professional character as to afford a presumption that their character formed the ground of their employment."³ This summary jurisdiction consists in compelling the attorney to do what he should do, or in suspending him for a time from the exercise of his profession, or in striking his name from the roll of attorneys, and annulling his license to practice.⁴ The motion against attorneys given by statute is a substitute for the more tedious remedy by action of debt or *assumpsit*, and the attorney,

¹ *People v. Rains*, 23 Cal. 128; *Quinn v. Wetherbee*, 41 Cal. 247; *Dibble v. Truluck*, 12 Fla. 185; *Burton v. Wiley*, 23 Vt. 430; *Farmers' Co. v. Walworth Bank*, 23 Wis. 249; *Burton v. Hynson*, 14 Ark. 32; *Austin v. Nelson*, 11 Mo. 192; *Kerby v. Chadwell*, 10 Mo. 392; *Gehrke v. Jodd*, 59 Mo. 522; *Biebinge v. Taylor*, 64 Mo. 63; *Spaulding v. Thompson*, 12 Ind. 477; 74 Am. Dec. 221; *Merritt v. Putnam*, 7 Minn. 493; *Babcock v. Brown*, 25 Vt. 550; 60 Am. Dec. 290; *Jones v. Leech*, 46 Iowa, 186; *Matthis v. Cameron*, 62 Mo. 504; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162. A party to a

suit cannot plead the neglect of his counsel as an excuse for his own negligence, where he is capable of acting in the matter for himself and by himself: *Boing v. Raleigh and Gaston R. R. Co.*, 88 N. C. 62.

² *Meacham v. Dudley*, 6 Wend. 514; *Elston v. Schilling*, 7 Robt. 74; *Sharp v. Mayor*, 31 Barb. 578; and see *Griel v. Vernon*, 65 N. C. 76.

³ *Weeks on Attorneys*, sec. 77; *Starr v. Vanderheyden*, 9 Johns. 253; 6 Am. Dec. 275; *Anderson v. Bosworth*, 15 R. I. 443; 2 Am. St. Rep. 910.

⁴ As to the two latter methods, see *ante*, Chapter XIII.

when proceeded against under the statute, may insist upon a set-off, or any other defense which it would be competent for him to make to an action, if that form of remedy had been adopted.¹

§ 194. When Summary Jurisdiction will and will not be Exercised.—The summary jurisdiction will not, however, be exercised where he is not an attorney of that court,² or the cause did not arise in whole or in part out of a case before that court,³ or was not connected with his official employment,⁴ nor where the client has obtained a judgment for his money against the attorney, and has thus changed their relation to that of debtor and creditor.⁵ In a proceeding by motion against an attorney for refusing to pay over the client's money when demanded, he is only chargeable with the amounts actually collected,—not with a deficit in the recovery of a judgment, arising from malfeasance or non-feasance.⁶ The Kentucky act, giving a summary remedy against attorneys who fail to pay over money collected for their clients, applies only to attorneys of the state, and to money collected by them officially, not to attorneys of the federal courts, nor to collections made under their process.⁷ Summary proceedings cannot be had to compel an attorney to pay over money received by him, on a bond and mortgage, as a land agent, not as an attorney.⁸ The statute of Mississippi gives the remedy, by motion, against attorneys, only when money has actually been collected by them, and they have refused to pay it over. It does not lie where they have taken notes, etc., in satisfaction

¹ Jones v. Miller, 1 Swan, 151.

² In re Phillips, 3 Jur. 479; In re Lord, 2 Scott, 131.

³ Thompson v. Gordon, 15 Mees. & W. 610.

⁴ Alexander v. Anderdon, 6 Beav. 405.

⁵ Windsor v. Brown, 15 R. I. 182; 2 Am. St. Rep. 892. Summary juris-

diction will not be applied where the money was not received in a professional capacity, or where it is withheld in good faith: In re Kennedy, 120 Pa. St. 497.

⁶ Croft v. Hicks, 26 Tex. 383.

⁷ Thomas v. Roberts, 5 Dana, 189.

⁸ In re Dakin, 4 Hill, 42.

of an execution.¹ A summary application to compel an attorney to pay over money received in his professional capacity is only entertained on motion of the client, and is not extended to assignees of clients.² One who has been an attorney is liable for conduct during that time, though he has since ceased to be an attorney;³ but the court will not generally interfere where the misconduct took place before the attorney was admitted.⁴

§ 195. For What Acts Summary Jurisdiction will be Exercised.—The court will summarily compel an attorney to perform his undertaking to pay money,⁵ and his obligation to pay over money collected for his client,⁶ or an excessive fee which he has retained for his services.⁷ An attorney who has received money in payment of costs awarded to his client by an erroneous order which has been reversed may be ordered to restore it.⁸ Where an attorney in an action is in contempt for the vio-

¹ *Banks v. Cage*, 2 Miss. 293.

² *Hess v. Joseph*, 7 Robt. 609.

³ *Scott v. Van Alstyne*, 9 Johns. 216.

⁴ *In re Page*, 1 Bing. 100; *Anonymus*, 2 Barn. & Adol. 736.

⁵ *In re Hilliard*, 2 Dowl. & L. 919; *Weeks on Attorney*, sec. 78; *Hathaway v. Brady*, 26 Cal. 581; *Dunn v. Hannerson*, 7 How. (Miss.) 579; *In re Bleakley*, 5 Paige, 311; *In re Silvernail*, 45 Hun, 575.

⁶ *People v. Smith*, 3 Caines, 222; *Saxton v. Wyckoff*, 6 Paige, 182; *In re Bleakley*, 5 Paige, 311; *Foster v. Townshend*, 68 N. Y. 203; *Kuhne v. Dailey*, 23 Hun, 282; *In re Steinert*, 21 Hun, 243; *People v. Wilson*, 5 Johns. 368; *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *In re H—*, 87 N. Y. 521; *People v. Smith*, 1 Colo. & C. Cas. 497; *Bohanan v. Peterson*, 9 Wend. 503; *Hess v. Joseph*, 7 Robt. 609; *Hynman v. Washington*, 2 McCord, 493; *Merritt v. Lambert*, 10 Paige, 352; *Wilmerdings v. Fowler*, 14 Abb. Pr., N. S., 249; *Grant's Case*, 8 Abb. Pr. 357; *Ex parte Statts*, 4 Cow. 76; *In re Mertian*, 29 Hun, 459. "The

summary jurisdiction exercised by the courts for the purpose of compelling attorneys to perform their duty to clients is not only just in itself, but it exerts a wholesome influence upon the whole body of the legal profession. If the client were driven to the dilatory and sometimes inefficient remedy by action, when the attorney improperly neglects to pay over money, a few unworthy members of the bar would bring odium upon all the rest." *In re Dakin*, 4 Hill, 42. But the ground for this summary proceeding is happily stated by Peckham, J., in *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, thus: "The law is not guilty of the absurdity of holding that after a client has spent years in collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from the attorney, and if that attorney should not pay, then try the same track again."

⁷ *Burns v. Allen*, 15 R. I. 32; 2 Am. St. Rep. 844.

⁸ *Forstman v. Schulting*, 108 N. Y. 110.

lation of an injunction therein, or for any act inconsistent with his relation to the court, and suitors have sustained damage, the remedy is by summary proceedings, not by action.¹ He will be summarily ordered to pay over money collected, although when the suit resulting in the collection was brought, he had a partner, the partnership having been dissolved before the collection was made. And it makes no difference that there were unsettled matters between the attorney and his partner, and that it is possible that the partner may have been instrumental in inducing the client to make the demand.² This summary jurisdiction, however, will only be exercised where the money has come into the hands of the attorney in his professional capacity,³ and as an attorney of the court in which the application is made.⁴ Money borrowed by one from a client who had sought his advice as to investing it, he delivering to her mortgages to secure

¹ *Foster v. Townshend*, 68 N. Y. 203.

² *Jeffries v. Laurie*, 23 Fed. Rep. 786.

³ *In re Dakin*, 4 Hill, 42; *Grant's Case*, 8 Abb. Pr. 357; *In re Haskin*, 18 Hun, 42; *Wilmerdings v. Fowler*, 55 N. Y. 641; *In re Husson*, 26 Hun, 130; 89 N. Y. 618.

⁴ *Ex parte Ketcham*, 4 Hill, 565, where it is said: "The power to determine that dispute on motion belongs, I think, exclusively to the superior court, as an attorney of which K. was acting. It was in consequence of his retainer as an attorney of that court, and the confidence reposed in him as such by Humbert, or his agent, that he was enabled to obtain the money. It makes no difference that he is also an attorney licensed by this court. The imputed default did not arise in the course of his practice here, or as a consequence of his license here. We cannot see that such license furnished any reason for the retainer, beyond that of the superior court. I admit there may be cases where an attorney of this and other courts, receiving money under an agency having no particular reference to a suit here, might be attached by this court for non-payment, on the principle that he

was retained in respect to his professional character. That would leave room for inferring that had he not been an attorney of this court, he would not have been so retained. But such an inference is excluded where the retainer was in a suit already brought, and pending in another court. It is impossible, then, to say that he is in default as an attorney of this court, which I take it we must see before we have authority to punish him by attachment. We might about as well attempt to punish a man for professional misbehavior in conducting a suit or defense in the court of a neighboring state as to interfere on this motion. Suppose the attorney of a county court be guilty of the plainest misconduct, — the mutilation of a record, for instance, — no one would suppose that we could issue process of contempt because he happened at the same time to be an attorney of this court. To warrant a rule against a person, the disobedience to which would be a contempt, he must not only be a party or officer of the court, but he must be so in respect to the particular wrong which he is ordered by the rule to repair."

its repayment, one of which he afterwards induced her to surrender and satisfy to enable him to sell the property, he stating that he would replace it by another just as good, which he failed to do, is not received by him in his professional character.¹ Where an attorney, under order of court, has paid into court all the money collected to which his client is entitled, the court has no further jurisdiction to summarily compel him to pay a further sum for other persons claiming a share in the fees retained by him.² But it is not necessary that the attorney should have received the money in any suit or legal proceeding, or that he should have been employed or instructed to commence legal proceedings. It is enough that the money was received in his character of attorney; as, for example, where a demand is left with him to collect or obtain better security, but without any directions to sue.³ The mode is by attachment usually, and it is no defense that the attorney retains the money in good faith.⁴ But payment of money collected by an attorney will not be enforced by order and attachment, where it appears to have been withheld under a *bona fide* claim for compensation. Such a case must go to a jury.⁵ The power of a court to compel, by summary motion, an attorney to pay over money collected extends to ordering a reference to determine the amount due to the attorney, or any counterclaim he may interpose for his services. He is not entitled to a jury trial of that question.⁶ The responsibility for the insertion of irrelevant and scandalous matter in pleadings rests with the attorney preparing the same, and the costs of a motion to have such matter stricken out should be charged to him.⁷ A demand, however, must precede

¹ In re Husson, 26 Hun, 130.

² Baldwin v. Foss, 16 Neb. 80.

³ In re Dakin, 4 Hill, 42; Ex parte Statts, 4 Cow. 76; Grant's Case, 8 Abb. Pr. 357.

⁴ Bowling Green Savings Bank v.

Todd, 52 N. Y. 489; Balsbaugh v. Frazer, 19 Pa. St. 99.

⁵ In re Harve, 14 Phila. 287.

⁶ In re Fincke, 6 Daly, 111.

⁷ McVey v. Cantrell, 8 Hun, 522.

the motion for attachment.¹ And the court will summarily compel him to keep his promises and undertakings as attorney;² as, for instance, his undertaking as attorney to enter appearance,³ or refer to arbitration.⁴ Bringing an action without authority will make the attorney liable, and the court will order him to pay the costs.⁵

¹ *Cottrell v. Finlayson*, 4 How. Pr. 36; *Mould v. Roberts*, 4 Dowl. & R. 242; *Ex parte Ferguson*, 6 Cow. 596; 719.

Taylor v. Bates, 5 Cow. 376; *Rathbun v. Ingals*, 7 Wend. 320. ⁴ *Ex parte Hughes*, 5 Barn. & Ald. 482.

² *Strike's Case*, 1 Bland, 57; *In re Gee*, 10 Jur. 694. ⁵ *Hubbart v. Phillips*, 2 Dowl. & L. 707; *Bayley v. Buckland*, 5 Dowl. & L. 115.

³ *Anonymous*, 1 Chit. 129; 2 Chit. 115.

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CHAPTER XVII.

LIABILITY OF CLIENT TO ATTORNEY.

- § 196. Attorney and counsel may sue for services.
- § 197. Contract implied to pay for attorney's services.
- § 198. How basis of compensation is arrived at.
- § 199. What compensation allowed where no express contract.
- § 200. Attorney may deduct fees from client's funds.
- § 201. Compensation out of fund in court.
- § 202. Retainer must be proved.
- § 203. And that services were rendered.
- § 204. In appellate courts.
- § 205. Attorney cannot recover compensation, when.
- § 206. Attorney may make special contract for compensation.
- § 207. Special contracts for compensation sustained.
- § 208. Special contracts for compensation not sustained.
- § 209. Special contract for complete service—Completion of service interrupted.
- § 210. Special contract for complete service—By withdrawal from case.
- § 211. Special contract for complete service—By dismissal of or from case.

§ 196. Attorney and Counsel may Sue for Services.—In England, while an attorney ^{own} bring an action for the value of his services, a barrister or counsel cannot.¹ This distinction was at an early day recognized in Pennsylvania,² but was subsequently rejected;³ and has likewise obtained in New Jersey.⁴ With this exception, however, it is now universally held in the United States that counsel as well as attorneys may recover compensation for their services.⁵ Even in those jurisdictions

¹ Weeks on Attorneys, sec. 333.

² Mooney v. Lloyd, 5 Serg. & R. 411.

³ Foster v. Jack, 4 Watts, 334; Balsbaugh v. Frazer, 19 Pa. St. 95; Lynch v. Commonwealth, 16 Serg. & R. 368; 16 Am. Dec. 582.

⁴ Seeley v. Crane, 15 N. J. L. 35; Shaver v. Norris, 3 N. J. L. 663; Van Atta v. McKinney, 16 N. J. L. 235; Hopper v. Ludlum, 41 N. J. L. 182. Counsel fees can be recovered by action where

an agreement has been made to pay a specific sum for services as counsel: Zabriskie v. Woodruff, 48 N. J. L. 610.

⁵ Balsbaugh v. Frazer, 19 Pa. St. 95; Smith v. Davis, 45 N. H. 566; Nichols v. Scott, 12 Vt. 47; Miller v. Beal, 26 Ind. 234; Webb v. Browning, 14 Mo. 374; Owens v. Monges, 1 Harr. (Del.) 14; Skett v. Sears, 15 Mich. 244; Wylie v. Coxe, 15 How. 416; Baird v. Ratcliff, 10 Tex. 81; Carter v. Bennett, 6 Fla. 214; Duncan v. Breithaupt, 1

where a counsel cannot collect his fees by process of law an action will lie on a bill of exchange or note given in

McCord, 149; Rust v. Larue, 4 Litt. 411; Vilas v. Downer, 21 Vt. 419; Caldwell v. Shepherd, 6 T. B. Mon. 389; Newman v. Washington, Mart. & Y. 79; Merritt v. Lambert, 10 Paige, 352; Wallis v. Loubat, 2 Denio, 607; Wilson v. Burr, 25 Wend. 386; Stevens v. Adams, 23 Wend. 57; Buckland v. Conway, 16 Mass. 376; Thurston v. Percival, 1 Pick. 415; Brigham v. Foster, 7 Allen, 419. Adams v. Stevens, 26 Wend. 451, contains a full history of the law on this subject from the earliest time. "The question," said the court, "is, whether by the laws of this state a counselor who is employed to argue a cause for his client, under an agreement to pay him a greater compensation for his services than the nominal counsel fee mentioned in the statute, can sustain an action to recover that compensation. Blackstone lays it down as the established law of England, that a counselor cannot sustain a suit for his fees; and he cites for this purpose the case of Moor v. Row, 1 Rep. in Ch. 38, in the time of Lord Coventry, 1629, where a demurrer was allowed to a bill brought by a counselor against a solicitor for counsel fees, which the latter had agreed to account for periodically. He also refers to the decree of the Emperor Claudius, mentioned by Tacitus, limiting the amount of gratuity which the advocate should be permitted to receive. It has also more recently been decided in England, that the practice of physic is a mere honorary employment; and that the medical practitioner cannot by suit recover a compensation for his services, but must be content to take such compensation only as is voluntarily offered: Chorley v. Bolcot, 4 Term Rep. 317; Lispecombe v. Holmes, 2 Camp. N. P. 441. I am not aware of any case in which it has been definitely decided, even in England, that a barrister cannot recover upon an express contract to pay him a specific sum for his services as counsel; but in the case of Turner v. Phillips, 1 Peake, 123, in which Lord Kenyon expressed the opinion that money paid to a barrister for his services could not be re-

covered back, he mentioned it as the general opinion of the profession, that the fees of barristers and physicians were as a present from the client or patient, and not a payment or compensation for services. It was upon this principle, I presume, that he decided the case of Fell v. Brown, 1 Peake, 96, where he held that an action would not lie against a barrister for gross negligence in conducting the cause of his client. This rule of considering the services of barristers and physicians as gratuitous merely, and as not entitling them to any legal claim to compensation, is supposed to have been derived from the civil law. But, as I understand that law, the advocate might recover upon an express promise to pay his honorary fee, although there was no implied promise arising merely from the relation of advocate and client. Among the early institutions of Rome, when the relation of patron and client existed between the patrician and the plebeian, the patron, who had accepted the promise of fidelity from the client, was bound to render him advice and assistance, and to sustain him in his litigations, without any other fee or reward than that which the client was bound to render him at all times, in virtue of his general relation of client. The relation which existed between them was similar to that of parent and child, or rather that of master and slave. But in the progress of society, when the relations of patron and client toward each other had totally changed, — when the business of advocating causes in the courts had become a profession, and before the credit system pervaded all the relations of life, — the client paid his advocate a fee in advance for his services, which was called a gratuity or present. As this was a mere honorary recompense, the client was under no legal obligation to pay it. But the result necessarily was, that if the usual present was not given, the advocate did not consider himself bound in honor to undertake the advocacy of the cause before the courts. Afterward, Marcus

consideration of his services.¹ In Indiana it has been held that a statute requiring attorneys to prosecute or

Cincius Alimentus, the tribune of the people, procured the passage of the law known as the Cincian law, prohibiting the patron or advocate from receiving any money or other present for any cause; and annulling all gratuities or presents made by the client to the patron or advocate. But as no penalty was prescribed for the breach of this law, it of course became a dead letter. The Emperor Augustus afterwards re-enacted the Cincian law, and prescribed penalties for its breach. But towards the end of his reign the advocates were again authorized to receive fees or presents from their clients. The Emperor Tiberius also permitted them to receive such forced gratuities. This led to the abuse referred to by Tacitus, and induced the senate to assist upon the enforcement, or rather the re-enactment, of the Cincian law, or rather the law limiting the amount of the fees of advocates, as referred to by Blackstone: 3 Bla. Com. 29, note. 12. Nero revoked the law of Claudius; which was subsequently re-enacted by the Emperor Trajan, with the additional restriction that the advocate should not be permitted to receive his fee or gratuity until the cause was decided: 1 Dupin, ains 39. The younger Pliny mentions a law not referred to by Dupin, which authorized the advocate, after the pleadings in the cause had been made and the judgment had been given, to receive the fee which might be voluntarily offered by the client, either in money or a promise to pay: See Merlin, art. Honoraires. Erskine, in his Institutes of the Law of Scotland, understands the law in the Digest *De Extraordinariis Cognitionibus* as authorizing a suit for the fee of a physician or advocate, without a previous agreement for a specified sum: 2 Ersk. Inst., by Mac-Allen, 695. Whatever may have been the case in Rome itself, it is settled by the law of Scotland, where the civil law prevails, that an action may be sustained on a promise to compensate

an advocate or a physician for his services: See Stair, Inst., by Brodie, b. I., tit. 12, art. 5, and n. b.; 2 Bell, Law Dict., tit. Fees; Ersk. Inst., b. III., tit. 3, art. 32; McKenzie v. Burntisland, Mor. Dic. of Decis. 11421. But in relation to the fees of physicians, the legal presumption there is, that they were settled at the time, except the fees for attending the patient in his last sickness; or where an agreement for a credit is proved; or where, by the custom of the place where the services are performed, the services of the physician are not paid for until the termination of the sickness of the patient: Johnson v. Bell, Mor. Dic. of Decis. 11418; Hamilton v. Gibson, and Flint v. Alexander, Mor. Dic. of Decis. 11422. It appears also to be the law of France, that the advocate may recover for his fees by suit. *Sirey Recueil Generale de Lois*, tom. 22, pt. 2, p. 141. But it appears to be considered dishonorable by the Parisian bar to bring suits for counsel fees; and those who should attempt to do it would be immediately stricken from the roll of advocates: 1 Dupin, aine, Prof. D'Avocat, 110, 698. Whatever may be the practice of other countries, however, the principle never has been adopted in this state that the professions of physicians and counselors are merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services; especially where there is an agreement to pay them a fixed compensation, or such a reasonable remuneration for their services as those services shall be deemed to be worth. The distinctions of patron and client, which formed one of the fundamental laws of ancient Rome, ceased in this state when slavery was abolished; and it is wholly inconsistent with all our ideas of equality to suppose that the business or profession by which any one earns the daily bread of himself or of his family is so much more honorable than the business of other members of the community as to pre-

¹ Mowat v. Brown, 19 Fed. Rep. 87.

defend certain cases without fee in effect imposes a tax to that extent upon such class, and is in violation of the constitutional provision for an equal rate of assessment and taxation upon all citizens.¹ A person performing services as attorney may recover their value, even though he has not been admitted to practice; provided there exists no prohibitory statute or rule of court on the subject.² So an attorney may recover for services, though not having a license required by law.³ But where a statute enacts, for the purpose of securing a more effectual compliance with its requirements in respect to the licensing of certain occupations, that no one shall engage in or carry on any such occupation until he shall have obtained a license as provided by the statute, it is an express prohibition without more particular words. Hence a lawyer who has not obtained a license, as was required by the internal revenue act of Congress, could not recover for professional services rendered while the act was in force; and a contract made by him to render such services was absolutely void.⁴ Where an attorney at law brought a suit in his own name as principal and owner, it was held that he could not recover counsel fees as the agent of another. He cannot, in the same proceeding, claim to be the owner and the agent of the owner of the same thing.⁵ An attorney individually engaged outside the county to which the business of the firm of which he was a member was confined may sue alone for his services.⁶

§ 197. Contract Implied to Pay for Attorney's Services.

—The attorney or counsel, then, is entitled to compensa-

vent him from recovering a fair compensation for his services on that account. I have no doubt, therefore, that by the law of this state, as it has always existed from the time of its first settlement, the lawyer as well as the physician was entitled to recover a compensation for his services; and that such services were never considered here as gratuitous and honorary merely."

¹ *Webb v. Baird*, 6 Ind. 13; *Blythe v. State*, 4 Ind. 525.

² *Harland v. Lillenthal*, 53 N. Y. 438; *Ames v. Gilman*, 10 Met. 239.

³ *Yates v. Robertson*, 80 Va. 475.

⁴ *Hall v. Bishop*, 3 Daly, 109.

⁵ *Ealer v. McAllister*, 19 La. Ann. 21.

⁶ *Moshier v. Frost*, 110 Ill. 206.

tion for all services rendered to the client in good faith and in a proper manner.¹ He may recover from those who employ him whatever sum his services are reasonably worth, and the performance of such services at the instance or with the consent of the person about whose business they were rendered implies a promise to pay for them *quantum meruit*.² An attorney at law, guardian of minors, can lawfully charge his wards for professional services in conducting litigation for their benefit.³ An attorney who is also a public administrator is not allowed, in addition to his compensation of office, fees as attorney in the administration of the estates.⁴ Where neither the duties nor the compensation of a city solicitor are prescribed, it is his duty, unless otherwise instructed, to perform such services as the interests of the city may require, and he may recover therefor what they are reasonably worth.⁵ The attorney is not necessarily prevented from recovering his fees because the litigation was unsuccessful, the non-success not being the result of his neglect or ignorance.⁶ An attorney's right of compensation is not lost because his services may have been of no benefit to his client, if they have been faithfully and intelligently rendered.⁷ Where parties take upon themselves the defense of a suit, after notifying the real defendant of the pendency of the action, they must pay their attorneys' fees.⁸ If the rate of compensation is fixed by statute, the law implies a promise to pay at least that rate, and the burden of proving that the attorney agreed to do the work for less rests on the client.⁹ If one attorney renders services for another, there is an im-

¹ Hallett v. Oakes, 1 Cush. 296.

⁷ Bills v. Polk, 4 Lea, 494.

² Balsbaugh v. Frazer, 19 Pa. St. 99; In re Paschal, 10 Wall. 483; Stow v. Hamlin, 11 How. Pr. 452.

⁸ Gaines v. Poor, 3 Met. 503; 79 Am. Dec. 559.

³ Mumma's Account, 5 Pa. L. J. 424.

⁹ Brady v. Mayor, 1 Sand. 569. In New York, in the absence of an agreement, the taxable costs are not necessarily the measure of the attorney's compensation: Starin v. Mayor, 106 N. Y. 82.

⁴ Loague v. Brennan, 86 Tenn. 634.

⁵ Kinnie v. Waverly, 42 Iowa, 486.

⁶ Brackett v. Sears, 15 Mich. 244.

Services.

compensa-

13; Blythe

53 N. Y.

10 Met.

Va. 475.

109.

La. Ann.

l. 206.

plied right to compensation, although such services are sometimes rendered gratuitously from courtesy.¹ It is fraud upon counsel for a client to settle a suit without his knowledge, to withhold fees, and then set up the statute of limitations.² A custom for attorneys to charge a client with a term fee at each term, excepting at the term at which the case is argued, when an arguing fee is taxed instead, and in addition thereto, when the defendant prevails, to charge the client with the taxable costs, exclusive of witnesses' fees and money advanced by the client, is reasonable and valid.³ So retainers are chargeable by custom, without a special contract;⁴ and attorneys may, by custom, become responsible for a sheriff's fees in the stead of the client.⁵

ILLUSTRATIONS.—The local attorney of a railroad company, in good faith and under circumstances which seemed to establish his authority, appeared for his company in a suit brought against it. *Held*, that he was entitled to compensation, though he acted without authority: *Boyd v. Railroad Co.*, 84 Mo. 615. The plaintiff, who was an attorney at law, was employed to accomplish the sale of an undivided estate, and for that purpose instituted proceedings, which were subsequently judicially declared to be invalid. *Held*, that he might nevertheless recover compensation for his services if it did not appear that he was incompetent or negligent: *Bowman v. Tallman*, 2 Robt. 385.

§ 198. How Basis of Compensation is Arrived at.—

On a *quantum meruit* for services as attorney, the professional standing of the attorney is to be taken into consideration, and the amount of his professional business,⁶

¹ Graydon v. Stokes, 24 S. C. 483.

² Lichty v. Hugus, 55 Pa. St. 434.

³ Bodfish v. Fox, 23 Me. 90; 39 Am. Dec. 611; Codman v. Armstrong, 28 Me. 91.

⁴ Eggleston v. Boardman, 37 Mich. 14.

⁵ Doughty v. Page, 48 Iowa, 483.

⁶ Phelps v. Hunt, 40 Conn. 97. In *Lombard v. Bayard*, 1 Wall. Jr. 207, the court said: "The law could not well fit a standard which would be

just in all cases, nor can the court. The services of men of skill and experience in their professions are not to be rated like those of day-laborers. It is a question of great delicacy for the court to be called upon to judge what is a proper compensation for them. The facts of the case, from their character, cannot be sufficiently brought, or very sufficiently discussed, before the court, nor the compensation tested by any certain rule; and this

and the nature and importance of the controversy in which the services were rendered.¹ In fixing the amount of a reasonable fee, regard should be had to what is customary for such legal services. The inquiry should be, not what the attorney thinks is reasonable, but what is the usual charge.² In short, the reasonable compensation recoverable by an attorney for his services in a cause is determined, not merely by the length of time engrossed, but by all the circumstances, including the professional skill and standing of the attorney, his experience, the nature and character of the question raised, and the result attained.³ No regular measure of value can be fixed for the services of counsel in trying a difficult case, or investigating intricate questions of law.⁴ Counsel should be allowed for their services what those services could have been obtained for by a contract made in advance.⁵ In a New York case it is said that it is proper

last point must generally be submitted to the candor and judgment of the members of a profession eminent among all others for honor and integrity. . . . Every gentleman of the bar well knows that there cannot be any one rule of charges in the nature of a horizontal tariff for all causes. Often where the parties are poor and the matters in contest small, counsel receive but very inadequate compensation for their exertion of mind and body; and for myself, I know that some of the most severe labors of my professional life have been the least well paid. In other cases, where the parties are wealthy, and the sum in controversy large, they will receive a tenfold greater compensation for a tithe of the same labor. In some cases the whole sum in dispute would be poor compensation; in others, five per cent of it will be very liberal. Hence in all cases professional compensation is gauged, not so much by the amount of the labor as by the amount in controversy, the ability of the party, and the result of the effort."

¹ Weeks on Attorneys, sec. 338; Garfield v. Kirk, 65 Barb. 464; Vilas

v. Downer, 21 Vt. 419; Duncan v. Breithaupt, 1 McCord, 149; Darby v. Knapp, 2 Mo. App. 486; Campbell v. Goddard, 17 Ill. App. 385. In estimating the value of an attorney's services in soliciting a pardon of a fugitive from justice, in order to obtain him as a witness, the amount of the claim in the case in which he was wished to testify is proper for the consideration of the jury: Kentucky Bank v. Combs, 7 Pa. St. 543. When the means of a succession are limited, the fees of counsel will be reduced in a corresponding degree: Succession of Virgin, 18 La. Ann. 42.

² Weeks on Attorneys, sec. 343, citing Reynolds v. McMillan, 63 Ill. 46; Webb v. Browning, 14 Mo. 354; Garr v. Mairret, 1 Hilt. 498; Smith v. Davis, 45 N. H. 566; Thompson v. Boyle, 85 Pa. St. 477.

³ Eggleston v. Boardman, 37 Mich. 14.

⁴ People v. Bond Street Savings Bank, 10 Abb. N. C. 15.

⁵ Middleton v. Bankers' etc. Tel. Co., 32 Fed. Rep. 524. In Colorado attorneys' fees are not taxable; they are a matter of contract between attorney and client: Fillmore v. Wells, 10 Col. 228.

to consider the amount, the questions of law, the labor and responsibility, and the interests (or the relative importance to the client of success or failure) involved, the result of the service, and the learning, tact, integrity, and assiduity of the counsel.¹ Two considerations, it is said in Louisiana, determine the judgment of the court in fixing a lawyer's compensation; namely, the amount and character of the work done, and the debtor's ability to pay.² The jury may take into consideration the amount the defendant had settled for with other persons charged in the same indictment, and for whom the same services were rendered.³ The amount an attorney receives in a case for his services is no criterion of the value of the services of another attorney in the same case, in the absence of any showing that the services were similar, the skill equal and the time spent the same.⁴ Where attorneys are employed to leave the state in which they reside to render professional services in another state, their compensation will be governed by the value of the services in the state in which they reside, rather than in the state where they were performed.⁵ An attorney who conducts a suit for A is entitled to reasonable compensation, without regard to what he received from B for conducting a suit depending on a similar state of facts, B's suit having been stayed by agreement, to await the determination of A's suit, which was finally determined in A's favor.⁶ An attorney cannot rightfully claim half the amount recovered, because the debt was desperate; he should prove his services, and may recover the usual compensation therefor.⁷ Where there was neither intricacy nor litigation in the administration of a succession valued at ten thousand dollars, the debts of which, principally for medical

¹ *People v. Bond Street Savings Bank*, 10 Abb. N. C. 15.

² *Breaux v. Francke*, 30 La. Ann., part 1, 336.

³ *Cunning v. Kemp*, 22 Wis. 509.

⁴ *Ottawa University v. Parkinson*,

14 Kan. 159; *Ottawa University v. Welsh*, 14 Kan. 164.

⁵ *Stanberry v. Dickerson*, 35 Iowa, 493.

⁶ *Bruce v. Dickey*, 116 Ill. 527.

⁷ *Christy v. Douglas, Wright*, 485.

services and funeral expenses, did not exceed one thousand dollars, two hundred dollars was considered a fair allowance to the attorney who settled the succession.¹ Twenty-five dollars is not an unreasonable attorney's fee for foreclosing a mortgage for eleven thousand dollars.² A fee of seven hundred dollars for the services of counsel in maintaining a will which controlled the disposition of an estate of sixteen thousand dollars is not excessive.³

The value of the services may be shown by the opinions of other lawyers testifying as experts.⁴ The question as to the value of services by an attorney is not one of science or skill for the testimony of experts. Any one who knows what the customary and usual charges of lawyers are can testify; but it is proper to exclude testimony as to the value of such services, when it is not shown that the witness has any knowledge as to the usual amount charged for attorney's fees.⁵ In a suit against a railroad for professional fees, proof that the services of a good attorney at the place where plaintiff was were reasonably worth so much per month is improper. The attention of the witness should be called to the particular services rendered, and his opinion predicated thereon.⁶ On an issue between attorney and client, as to the value of the former's services in a suit in which the latter was plaintiff, and which was settled without a trial, the opinion of the counsel of the defendant in such suit that the plaintiff therein had no case is competent evidence.⁷ In Louisiana the supreme court will not be implicitly governed, in regard to questions relating to the value of professional services rendered

¹ *Uzee v. Biron*, 6 La. Ann. 565.

² *Hitchcock v. Merrick*, 15 Wis. 522.

³ *Roth's Succession*, 33 La. Ann. 540. As to what is a fair compensation for the services of an attorney in defending persons indicted for larceny, see *Fraatz v. Garrison*, 83 Ill. 60.

⁴ *Harland v. Lilienthal*, 53 N. Y. 438; *Garfield v. Kirk*, 65 Barb. 464; *Brewer v. Cook*, 11 La. Ann. 637; *Vilas v. Downer*, 21 Vt. 419; *Cullom v. Mock*,

21 La. Ann. 687; *Barker v. Company*, 3 Thomp. & C. 328; *Rose v. Spies*, 44 Mo. 20; *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611. And the report of a referee founded on such testimony will not be disturbed: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567.

⁵ *McNiel v. Davidson*, 37 Ind. 336.

⁶ *Southgate v. Atlantic and Pacific R. R. Co.*, 61 Mo. 89.

⁷ *Aldrich v. Brown*, 103 Mass. 527.

their clients by attorneys at law, by the opinions of legal men taken in evidence, but will be guided by a conscientious estimate of the value of the services performed, and will, of itself, fix the amount without reference to the opinions of witnesses.¹ But in determining the money value of the services of an attorney in settling up the affairs of a succession, the court, in the absence of sufficient other evidence, will be guided by the opinion of the local bar to which he belongs.² In Illinois it is said, that, in fixing an attorney's fees, the chancellor should exercise his own judgment as to what is the usual charge, and not be wholly governed by the opinions of attorneys.³

ILLUSTRATIONS. — A charge of two hundred dollars per year *held*, under the circumstances of the case, a moderate compensation for services rendered by an attorney as agent for a corporation for eleven years, independent of his fees and commissions as attorney or counsel, in suits brought by or against the company, or in which they were interested, and his traveling expenses and other disbursements: *Farmers' Loan etc. Co. v. Mann*, 4 Robt. 356. Ten per cent of a sum obtained for the corporation, from the assets of a bank, by his services, whereby an allowance to a rival creditor thereof of seventy-six thousand dollars had been reduced to less than three tenths of the amount reported, *held* not an unreasonable compensation therefor, aside from said two hundred dollars per year: *Farmers' Loan etc. Co. v. Mann*, 4 Robt. 356. In assessing damages on dissolution of an injunction, proof that the services of the defendant's counsel were reasonably worth two thousand five hundred dollars, *held* to be insufficient for a recovery thereof, without showing how much they had become liable to pay their counsel, and what were the customary fees in such cases: *Rces v. Peltzer*, 1 Ill. App. 315. In a proceeding for partition, an attorney's fee of five hundred dollars, *held* to be unreasonable, testimony of lawyers to the contrary notwithstanding: *Dorsey v. Corn*, 2 Ill. App. 533. Plaintiff, an attorney, sued to recover compensation for services in a matter involving upward of a million dollars. *Held*, that it was error to instruct the jury that the magnitude of the controversy and the great value of the property should not be considered in determining what compensation plaintiff was entitled to recover: *Smith v. Chicago and Northwestern R'y Co.*, 60 Iowa, 515.

¹ *Randolph v. Carroll*, 27 La. Ann. 467.

² *Dorsey v. Corn*, 2 Ill. App.

³ *Jackson's Succession*, 30 La. Ann., 533.

part 1, 463.

§ 199. What Compensation Allowed where No Express Contract.—

A solicitor is entitled to charge for attendance, if he actually attends the hearing, though he does not hear the whole argument or take any part in it.¹ The fact that other counsel were engaged will not deprive him of his fee. But where several suits are to depend on the argument in one, the charges must not be multiplied at the full rate.² Counsel who have prepared for hearing are not deprived of the right to a full counsel fee by the fact merely that the case was disposed of on grounds not raised in the argument.³ An attorney retained in a case is entitled to a reasonable retaining fee without any special contract therefor.⁴ A demand on the client for a certain sum as his compensation does not, if refused, restrict the attorney from recovering only that sum.⁵ The attorney is not called on to look to the collection of the demand for his fee, nor to wait for it until it be collected.⁶ He is entitled to his retaining fee in advance.⁷ It is not usual to charge more than one retaining fee in the same case, and if he charges more than one, he will not be allowed to recover such extra charge in a suit for his services.⁸ The right to an appearance fee depends upon a contract, either express or implied, with the party against whom it is charged.⁹ In the absence of a special agreement, or of proof that the client employed the attorney, with knowledge of and implied assent to the bar rules, a client is not necessarily bound to pay for the services of an attorney or counselor according to rates which may have been prescribed for such services by the general regulations of an association of the bar, but is liable only for a *quantum meruit*. Regulations adopted by members

¹ Wendell v. Lewis, 8 Paige, 613.

² Brackett v. Sears, 15 Mich. 244.

³ Bates v. Desenberg, 47 Mich. 643.

⁴ Aldrich v. Brown, 103 Mass. 527.

But see McLellan v. Hayford, 72 Me. 410.

⁵ Miller v. Beal, 26 Ind. 234.

⁶ Nichols v. Scott, 12 Vt. 47.

⁷ Cavillaud v. Yale, 3 Cal. 108.

⁸ Schnell v. Schlernitzauer, 82 Ill. 439.

⁹ Neighbors v. Maulsby, 41 Md. 478.

of the bar can operate only as between those who assent to them. As between attorney and client, the right to recover for services must be determined by the general law, and not by rules of the bar.¹ An attorney who acts as broker for his client, in negotiating the sale or pledge of personal property, is entitled to be paid as such; but he cannot also charge a counsel fee for conversations with his employer in relation to the same transaction, unless by express contract.² An attorney who is employed by an assignee for the benefit of creditors, as the assignee's general adviser, cannot charge retainers in suits that he is compelled to try.³ An attorney for an executor cannot, under a general retainer, charge his client for answering the inquiries of creditors respecting their claims.⁴ An attorney at law, under a charge of commission on money collected, may recover a fair compensation for services rendered, not included in his specific charges, although the client personally makes the collection; and the time of making such charge is immaterial.⁵ If a solicitor has neglected to furnish his client with a statement of his extra expenses in the suit beyond the amount recovered of the adverse party, the amount so recovered will be presumed to be all he has any right to claim.⁶ As between attorney and client, costs are to be taxed according to the fee bill in existence when the respective services were rendered.⁷ An attorney representing a junior execution on which nothing is realized from the fund levied on is not entitled to fees from it.⁸ Five thousand dollars may be a fair and reasonable fee for services rendered by an attorney to an assignee in bankruptcy, which, after protracted litigation, resulted in saving thirty thousand dollars for the estate.⁹

¹ *Boylan v. Holt*, 45 Miss. 277.

² *Walker v. American Nat. Bank*, 49 N. Y. 659.

³ *In re Schaller*, 10 Daly, 57.

⁴ *In re Knapp*, 8 Abb. N. C. 308.

⁵ *Pierce v. Parker*, 121 Mass. 403.

⁶ *Matter of Bleakley*, 5 Paige, 311.

⁷ *Brooklyn Bank v. Willoughby*, 1 Sand. 669.

⁸ *Mitchell v. Atkins*, 71 Ga. 680.

⁹ *In re Treadwell*, 23 Fed. Rep. 442; 9 Saw. 29.

ILLUSTRATIONS.—Three members of the bar entered their appearance for a defendant, having been employed generally to appear, and no warrant of attorney was given to either. *Held*, that the attorney's fee was to be equally divided between them: *Hurst v. Durnell*, 1 Wash. 438. Through the advice of the counsel of the receiver of an insolvent corporation, whose assets were uncertain, twenty suits were begun, in eleven of which compensation was claimed, and the services were instrumental in saving over \$115,000. *Held*, that the fact that the trust was successfully administered might be considered, and a charge of \$22,646 was not necessarily excessive: *People v. Bond Street Savings Bank*, 10 Abb. N. C. 15. It was the duty of an attorney employed by a corporation engaged in loaning money, in Oregon, to give it counsel generally (wherefor no compensation was expressly provided), and to examine titles, wherefor he was permitted to charge borrowers' specific fees, and for some years he rendered no bill. *Held*, that he was entitled to recover for his services as counselor merely a reasonable annual retainer: *Hughes v. Dundee Mortgage and Trust Investment Co.*, 21 Fed. Rep. 169. A local attorney defended one hundred and sixty-four infringement suits in the New England circuits against dentists, whose defense was in charge of the corporation employing the attorney. The suits were disposed of in defendants' favor, after the disposition of a test case. The attorney charged his client, the corporation, six thousand dollars, and collected costs amounting to four thousand six hundred dollars, which he credited on the six thousand dollars. *Held*, a reasonable charge: *Celluloid Mfg. Co. v. Chandler*, 27 Fed. Rep. 9.

§ 200. Attorney may Deduct Fees from Client's Funds.

—An attorney who has money in his hands which he has recovered for his client may deduct his fees from the amount, and payment of the balance will discharge him.¹

¹ *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63. In *Balsbaugh v. Frazer*, 91 Pa. St. 99, the rule is stated thus: "If the client is dissatisfied with the sum retained, he may either bring suit against the attorney, or take a rule upon him. In the latter case the court will compel immediate justice, or inflict summary punishment on the attorney, if the sum retained be such as to show a fraudulent intent. But if the answer to the rule convinces the court that it was held back in good faith, and believed not to be more

than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial. If, upon the trial, the jury finds that the attorney claimed no larger fee than he was justly entitled to, and in other respects behaved faithfully and well about his client's business, he should be allowed his demand and a verdict rendered in his favor, if he has paid the balance; or a verdict against him only for the balance, if he has not paid it; or a certificate, as in this case, for what may still be coming to him. But

The fact that a client has sued his attorney for money collected on a debt due to him does not prevent the attorney from retaining from said money his fees for collection.¹ But the attorney cannot retain his fees out of money left him by the client as a special deposit for a special purpose.²

ILLUSTRATIONS. — An attorney receives one hundred and fifty dollars from a thief for services to be rendered, and after having rendered services to the value of ninety dollars is notified by the person from whom the money was stolen that it belongs to him. The attorney cannot hold the remaining sixty dollars for services rendered after the notice: *Wheeler v. King*, 35 Hun, 101.

§ 201. **Compensation out of Fund in Court.**—Where the compensation of an attorney for professional services in securing a fund in the hands of a receiver for distribution is, by the rules governing courts of equity, a proper charge upon the fund, application for such compensation out of the fund should be made in the action in which the receiver was appointed.³ The Illinois statute which permits the apportionment of solicitors' fees among those interested in the settlement of an estate in the probate court applies only to amicable proceedings, not to suits where parties employ counsel to protect their special adverse interests.⁴ A counsel is not entitled to commissions on a fund raised and brought into court, if his client's claim is postponed to older liens.⁵ The counsel of certain creditors who unsuccessfully seek relief on be-

if he has not acted in good faith; if he has attempted to defraud his client, or connived at the fraud of others; if he has received money without giving notice to the client within a reasonable time; if he has refused or neglected to pay it promptly upon demand; if he has denied that he had it when questioned by one entitled to know; or if he has fraudulently claimed the right to retain out of it a larger fee than the jury find to be just, — he forfeits all claim to any com-

pensation whatever, and the verdict should be in favor of the client for all the money collected, allowing no deductions for anything but actual payments. A party must not be put to two suits to recover the same debt."

¹ *Foster v. Jackson*, 8 Baxt. 433.

² *Anderson v. Bosworth*, 15 R. I. 443; 2 Am. St. Rep. 910.

³ *Olds v. Tucker*, 35 Ohio St. 381.

⁴ *Cowdrey v. Hitchcock*, 103 Ill. 262.

⁵ *Waters v. Greenways*, 17 Ga. 592.

half of themselves and of all other creditors against the officers of an insolvent corporation cannot charge their compensation against a fund belonging to the corporation. They must look to the creditors employing them.¹

ILLUSTRATIONS. — Under the Mississippi code, providing that "in all cases of the partition or sale of property for division of proceeds the courts may allow a reasonable solicitor's fee to the solicitor of the complainant," *held*, that a solicitor of a defendant and cross-complainant was not entitled to a fee, though the cross-bill asked for partition: *Potts v. Gray*, 60 Miss. 57. An agreement that an attorney should be compensated out of the fund recovered, *held* to create an equitable lien, having priority over that of an attachment issued under a judgment recovered against the client: *Williams v. Ingersoll*, 23 Hun, 284. The trustee of an idiot, for whom a charge of two thousand dollars was made upon land for her support, obtained a decree for the sale of the land, and the setting apart of two thousand dollars of the proceeds, the interest of which was to be appropriated to the support of the idiot. *Held*, that two hundred dollars should be allowed out of the two thousand dollars, as a fee for the trustee's attorney: *Nimmons v. Stewart*, 13 S. C. 445. Plaintiff, being employed as solicitor for a certain sum to look after defendant's interest in an estate, instituted proceedings in chancery, which resulted in the settlement of the estate, and necessarily involved the interests of other persons. The court made an allowance out of the estate to the different solicitors employed. *Held*, that the whole amount thus received by plaintiff should be credited upon his contract with defendant: *Shreve v. Freeman*, 44 N. J. L. 78.

§ 202. **Retainer must be Proved.** — In order to recover, the attorney must first prove a retainer by the defendant.² It is not enough that services were performed in managing a cause, and that they were beneficial to the party.³

¹ *Hume v. Commercial Bank*, 13 Lea, 496.

² *Weeks on Attorneys*, secs. 336, 338.

³ *Turner v. Myers*, 23 Iowa, 391; *Webb v. Browning*, 14 Mo. 354; *Chicago etc. R. R. Co. v. Larned*, 26 Ill. 218; *Campbell v. Kincaid*, 3 Mon. 68; *Roselius v. Delachaise*, 5 La. Ann. 481; 52 Am. Dec. 597; *Cooley v. Cicile*, 8 La. Ann. 51; *Michon v. Gravier*,

11 La. Ann. 596; *Smith v. Lyford*, 24 Me. 147; *Burghart v. Gardner*, 3 Barb. 64; *Jones v. Woods*, 76 Pa. St. 408; *Wailles v. Brown*, 27 La. Ann. 411. In *Turner v. Myers*, 23 Iowa, 391, a son brought a replevin suit in his own right for a horse, executing a bond upon which his mother was surety. The case was appealed to the district court, and an attorney was there employed by the son to assist in the

But the retainer need not be in writing, or by an express parol contract; it may be established by circumstances;¹ as, for example, by the party accepting the services on the understanding that he was to pay for them;² or by his recognition of the attorney as his attorney.³ "In the absence of an express retainer, an attorney may prove that the person sought to be charged conferred with him in regard to the suit; executed his directions in connection therewith; makes affidavit to the truth of the answer which the attorney has drawn; was present at the trial which the attorney was managing in the client's behalf without making any objection; intrusts to the attorney papers necessary to the successful prosecution of the suit; or that the client acknowledged or in some manner recognized the attorney in the presence of third persons;—all these things are evidences of a retainer, and will be strengthened by the fact that the attorney was acknowl-

trial. Judgment being there rendered against the plaintiff and his mother as surety on the bond, he employed the attorney to commence a suit in equity in his own and his mother's name to restrain the collection of the judgment, in which plaintiffs failed; whereupon they appealed to the supreme court. It appeared that the attorney had never seen the mother; that she never personally requested him to perform any services for her; but that she knew of the proceedings. The attorney sought to charge her with the payment of his fees, which the court disallowed, saying: "When it appears that an attorney commenced a suit in the name of the principal and surety, . . . without being requested by such surety to perform any services for her, the single fact that she knew of his proceedings will not make her liable for his services. . . . The express contract with the son and his primary liability, in the absence of other proof, . . . justify the conclusion that the son, and not the mother, was the one to whom the attorney was to look for his pay. . . . It was the attorney's duty to prove his retainer

by the person sought to be charged. This he might do by showing that the defendant called upon him in regard to the business; that she executed his directions in connection therewith; that she was present at the trial while he was managing it on her behalf; or that she spoke of or recognized him in some manner as her attorney"; *Hubbard v. Camperdonn Mills*, 25 S. C. 496; *Ex parte Lynch*, 25 S. C. 193; *Safford v. Vt. etc. R. R. Co.*, 60 Vt. 185.

¹ *Graves v. Lockwood*, 30 Conn. 276; *Hood v. Ware*, 34 Ga. 328; *Fore v. Chandler*, 24 Tex. 146; *Perry v. Lord*, 111 Mass. 504. Where an attorney is called on for legal advice and gives a professional opinion, the relation of attorney and client so exists as to render the attorney liable for negligence: *Rya v. Long*, 35 Minn. 394.

² *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Bogardus v. Livingston*, 7 Abb. Pr. 423.

³ *Hotchkiss v. Le Roy*, 5 Johns. 142; *Goodall v. Bedel*, 23 N. H. 205; *Fore v. Chandler*, 24 Tex. 146; *Cooper v. Hamilton*, 52 Ill. 119; *Yerger v. Aiken*, 7 Baxt. 539.

edged as such by the counsel of the opposite side. If an attorney having in his hands papers necessary to be used in the defense of a suit enter upon that defense in the presence of the party for whom he appears, and retains the papers without objections, such facts are evidence of a retainer and promise to pay for his services, as well upon the particular occasion of the first appearance as afterwards."¹ A parol employment by the board of county commissioners, at a legal session, of an attorney to defend a suit brought against the county is valid, and such attorney, having rendered the service involved in his employment, may recover compensation therefor.² Where a party, by his acts, induces an attorney to suppose that his services are desired, and avails himself of them without objection, the law implies a promise on his part to pay the attorney what such services are reasonably worth.³ A party to a suit in which the employment of senior counsel is necessary is liable for the reasonable value of the services of a counselor at law who acts as senior counsel at the trial, in his presence, in consultation with him, and without objection from him, under a retainer for that purpose by the attorney of record, although there was a secret agreement between him and the attorney of record that such services should be paid for by the latter.⁴ The presence of a prosecutor, while an attorney was engaged in rendering professional service on the part of the government in a criminal proceeding, raises no presumption that the prosecutor promised to pay him for such service.⁵ One who has employed a lawyer who afterwards takes a partner, who assists in the case, does not become liable to the firm for the fee agreed to be paid to the one contracted with before the partnership, by simply consulting with such partner about the case, and to that

¹ Weeks on Attorneys, secs. 339, citing Goodall v. Bedell, 20 N. H. 203.

² Ector v. Wiggins, 30 Tex. 55.

³ McCabe v. Commissioners of Foun-
tain County, 46 Ind. 380.

⁴ Brigham v. Foster, 7 Allen,

419.

⁵ Millett v. Hayford, 1 Wis. 401.

extent recognizing him as his attorney.¹ Evidence that one who had a claim which he intended to prosecute at law sent for an attorney and employed him to assist him as counsel through the whole case, and that the attorney agreed so to do, and gave him advice several times, will warrant a finding for the attorney in an action by him for a retainer.² If an assignee of a chose in action, that is in suit, accepts from the defendant a specific sum in lieu of damages and costs he becomes liable to the attorney who prosecuted the suit for the taxable costs.³ When a bill is filed by a debtor as trustee for his children to enjoin judgment creditors, some of whom have levied and others are about to levy upon his property, and a fund is brought into court for equitable distribution, counsel for the trustees who filed the bill are not entitled to fees to be paid out of the general fund raised. The interest to represent which such counsel were employed is antagonistic to the general creditors, whose judgments have been enjoined.⁴ A retainer by a wife to obtain a divorce will not be presumed to have been at her husband's request, so as to render him liable to pay the attorney.⁵

ILLUSTRATIONS.—In an action against A and his sureties, B and C, an attorney was employed by A. *Held*, that the fact that B and C knew that he was representing the whole case, and the services were for their benefit and accepted by them, does not require that they, in order to avoid liability to pay for the services, should have notified the attorney that they would not be liable: *Simms v. Floyd*, 65 Ga. 719. It was attempted by one representing himself as agent for a ship-owner, and by the consul of the nation to which she belonged, to remove the master from the command. The latter employed counsel to maintain his right thereto. *Held*, that the owner, if his interests conflicted with the course pursued by the master, would not be liable for fees of counsel employed by him: *Barker v. York*, 3 La. Ann. 90. B is employed by one defendant to a suit to act as counsel for him, and also for another defendant, of which the latter was apprised, but who had counsel of his

¹ *Carr v. Wilkins*, 44 Tex. 424.

² *Perry v. Lord*, 111 Mass. 504.

³ *Ward v. Lee*, 13 Wend. 41.

⁴ *Ball v. Vason*, 56 Ga. 264.

⁵ *Dorsey v. Goodenow, Wright*, 120.

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own employment, and had not employed B. *Held*, that although the services of B may have been beneficial to such other defendant, and received and accepted by him, yet he would not thereby incur any liability to pay for them; otherwise, if he was apprised that he was looked to by B for compensation for his services, and afterwards received them without informing him that he would not pay for them: *Savings Bank etc. v. Benton*, 2 Met. (Ky.) 240. In an action to recover for professional services rendered to the defendant in a divorce case, it appeared that he adopted the papers prepared by the plaintiffs, and that they were recognized by the libellant's counsel as counsel for the defendant. *Held*, that the employment of the plaintiffs was established: *Hood v. Ware*, 34 Ga. 328. An attorney employed to defend a suit signed as bail for an appeal taken by his client therein. Subsequently an action was brought upon the recognizance against both principal and surety, and the latter, the attorney, without express authority, appeared for both, and pleaded, as the only defense, a tender which had been made by him without any request by his principal. *Held*, that he could not recover in any action of book-account for his professional services in defending the suit on the recognizance, although the principal knew that he was defending the suit and made no objection: *Smith v. Dougherty*, 37 Vt. 530. An attorney who was employed by his client in the prosecution and defense of many suits gave a voluntary appearance for him in a new suit brought against him upon a subject connected with suits then pending. About the time of serving this appearance the attorney told him that he had appeared for him, and he expressed no dissent. *Held*, that the attorney's appearance was not unauthorized, but under such facts he might well assume a retainer: *Bogardus v. Livingston*, 7 Abb. Pr. 428. Proof that an attorney was employed by one having a claim at law to assist him in its prosecution, agreed to do so, and gave him advice several times, *held*, to warrant a finding for a retainer: *Perry v. Lord*, 111 Mass. 504. A, an attorney, having no authority from his client B to employ additional counsel, employed C, an attorney in another county, to attend to a case in that county pending against B. At the trial of the case, C, with B's knowledge, though not at his request, assisted in impaneling the jury in taking evidence, and in consultation regarding the defense. *Held*, that C was entitled to recover from B for his services: *Hogate v. Edwards*, 65 Ind. 372. Attorneys acting without any employment under seal, but at the request of the town council, addressed a meeting of the citizens, explaining the terms upon which the holders of bonds of the town proposed to cancel them. The proposal was accepted by the

meeting, and the attorneys were directed to prepare an ordinance for the purpose of consummating the settlement. They did so, and the town council afterwards adopted the ordinance, and the bonds were taken up in pursuance thereof, and the whole matter adjusted with the assistance of the attorneys. *Held*, that they were entitled to recover pay from the town for their services: *New Athens v. Thomas*, 82 Ill. 259. An attorney who had conducted a suit in which L. was plaintiff charged his fees to L. and W. jointly, and brought an action against both to recover them. L. and W. had called on the attorney, W. being the father-in-law of L., and together stated the case, which was a claim of L. for damages for a personal injury; W. saying: "We have a case that we want to lay before you, and have you prosecute if you think best"; and in the course of the conversation also saying: "If you think the case a good one we want you to go through with it"; but nothing was said directly by either party as to whether W. would be responsible for the attorney's fees, and W. did not intend to be understood as agreeing to be responsible, though the attorney supposed he was to be so, and charged his fees to them both. On these facts the auditor submitted the question to the court as a question of law whether W. was liable. *Held*, that the question whether W. employed the attorney was a question of fact which should have been decided by the auditor, and that the facts as found presented no question which the court could decide as a question of law: *Graves v. Lockwood*, 30 Conn. 276. An attorney brought an action in the district court of an adjoining county, and after the filing of the petition wrote to a firm of attorneys there requesting them to file the proper pleadings, informing them that his client would call to state necessary facts, and saying: "I will see you paid for your trouble." The client called on said attorneys a number of times, and they filed the necessary papers, and assisted in the trial of the case, and in procuring a decree, nothing being said by her to them about the contract made by her with the attorney who filed the petition, and they had no knowledge of such contract. *Held*, that the client was liable for their fees: *Sedgwick v. Bliss*, 23 Neb. 617.

§ 203. **And that Services were Rendered.**—Evidence alone that the attorney was employed is not enough; he must show also that he has performed the service. The law will not presume from the mere proof of the undertaking that the party has performed any valuable service

under it.¹ Where a solicitor sought by a creditor's bill to obtain payment for professional services out of an estate, the remainder in fee of which was in certain infants, on the ground that the services were necessary to preserve the inheritance to those who were entitled to it, and failed to prove that his services were necessary or had produced that effect, his bill was dismissed, and he was admitted *pro rata* with other creditors to share the proceeds of the estate which were in the hands or in the possession of a trustee.²

ILLUSTRATIONS.—M. rendered valuable services in a suit at the request of and as assistant attorney to G., a defendant with whom the co-defendants had contracted that he, G., should, for a stipulated sum, defend the suit and employ and pay assistant counsel. *Held*, that M., not being informed of such special contract, might recover his compensation against all the defendants: *McCrary v. Ruddick*, 33 Iowa, 521. One attorney agreed to recover a certain claim by suit; he agreed with another attorney that the latter should prosecute the suit referred to for half the pay and costs; the latter brought a suit and lost it; the former then filed a bill and recovered the claim, the latter not offering to aid in the prosecution. *Held*, that the latter had done no work in the successful suit, and was not entitled to do any under his agreement, and therefore could recover no pay under his agreement: *English v. McConnell*, 23 Ill. 513.

§ 204. In Appellate Courts.—A retainer to conduct a suit in the lower courts does not necessarily imply a retainer to carry the case up to the court of last resort. But where a case is intrusted to an attorney for appeal to a higher court, he is not responsible for the merits or demerits of the appeal, but is entitled to payment for his services in any event.³ Where there is a general employment of an attorney for an agreed sum, the employment extends until the final termination of the case in the court of last resort, so that no additional sum can be

¹ *Stow v. Hamlin*, 11 How. Pr. 452.

² *Warner v. Hoffman*, 4 Edw. Ch. 381.

³ *Weeks on Attorneys*, citing Case

v. Hotchkiss, 3 Keyes, 334; 3 Abb. Pr., N. S., 381.

charged for services rendered, unless there is an express agreement to pay for the same.¹

ILLUSTRATIONS. — An attorney, on his own motion, after knowledge that the cause was settled, procured a transcript to be filed in the supreme court, and a judgment of affirmance rendered. *Held*, that he could not recover for such services: *Ellwood v. Wilson*, 21 Iowa, 523. A client signed an agreement with his attorney, running substantially thus: H. is to argue my case before the supreme court, and if he succeeds, I am to pay him one thousand dollars; and if it shall be necessary to contest the case in the court of appeals, he is to have further just compensation. If I settle the case with the other parties without his approval, I am to be liable for his full compensation, as herein provided. H. was unsuccessful in the supreme court, and by direction of his client appealed to the court of appeals. Soon after, his client, without consulting H., settled the case. *Held*, that the agreement to pay the one thousand dollars was conditional on H.'s success in the supreme court, and that the settlement of the case, after the failure there, did not resuscitate H.'s claim: *Hitchings v. Van Brunt*, 38 N. Y. 335.

§ 205. Attorney cannot Recover Compensation, when.

—The attorney cannot recover compensation when the services were of no avail, because of his fraud, negligence, and want of skill.² He is not necessarily precluded from

¹ *Bartholomew v. Langsdale*, 35 Ind. 278.

² *Maynard v. Briggs*, 26 Vt. 94; *Nixon v. Phelps*, 29 Vt. 198; *Pearson v. Darrington*, 32 Ala. 227; *Brackett v. Norton*, 4 Conn. 517; 10 Am. Dec. 179; *Gleason v. Clark*, 9 Cow. 57; *Runyan v. Nichols*, 11 Johns. 547; *Bowman v. Tallman*, 40 How. Pr. 1; *Bridges v. Paige*, 13 Cal. 641, the court saying: "The plaintiffs aver that the defendant is indebted to them in the sum of say fifteen hundred dollars, for services rendered; that he is indebted to this amount because this was the value of these services. The defendant denies that he is indebted at all, and denies, further, that the services were of the value charged. He proposes to show that they were not of this value. He can do this by any legal proof, and he is not bound

to set out his proofs in his pleading. Facts, and not the evidence of facts, are required to be pleaded. Whatever, therefore, had a legal tendency to prove that these services were worth the sum was competent for plaintiffs, as the nature of the suit, its difficulty, the amount involved, the skill required, the skill employed, and the like. So the defense had a right to prove these same general matters, or the negation of them, as, for example, that this was a plain case, requiring but little labor or skill, learning or time; or if it required skill and attention, that these were not bestowed. The value of a lawyer's services depends upon his skill and learning, and the attention he gives to the business of the client. It is evident, therefore, that proof of his skillful conduct of his case, or of his negligent and un-

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recovering compensation for services in a suit, where the adverse decision rendered was anticipated by him, notwithstanding the services may have been of no value.¹ He may explain his reason for delay in instituting an action for his client, when his claim for fees is contested on the ground of unreasonable delay.² An attorney under general employment can enforce no claim for services until final termination of the suit, unless the relation of attorney and client changes before that time.³ He cannot recover against his client the costs of a suit in which judgment is set aside for irregularity committed by himself, nor the costs of opposing the motion to set aside the proceedings; nor can he recover for money paid for his client, if it were paid to satisfy costs of a judgment of discontinuance suffered by his ignorance or neglect.⁴ So if an attorney, after having obtained final judgment and execution, prevents the collection of the execution by fraudu-

skillful treatment of it, is an important inquiry. It does not follow, by any means, that because a trial results in a verdict for the client, there has been no negligence in the attorney. In consequence of the negligence, the client may have been put to great trouble and expense, though, by accident or otherwise, he happened to gain the case; and though the court below may have decided on the trial of a case that errors negligently committed were not fatal, yet the defendant might show, when sued for fees by the attorney, that the judge was mistaken in thus holding. Besides, a case may be negligently conducted even when it is not eventually lost by neglect. It may put the client to great trouble, expense, and delay to get rid of blunders of his lawyer. If, for example, an attorney should, by his neglect, consent to a bill of exceptions full of errors and misstatements, and raising unnecessarily many difficult and embarrassing questions of law for revision in the appellate court, which questions, as the case, in fact, was presented below, did not arise, no one would pretend that though the

cause was, after long delay and much loss, gained in the supreme court, the attorney would not be amenable to the charge of neglect; or if the attorney suffered testimony to be introduced plainly inadmissible, and the client was put to the expense and trouble of summoning many witnesses to counteract it, though he at length did so successfully, the same objection would lie; and in both these instances the attorneys would be held entitled to a less sum on *quantum meruit* than if a contrary course had been pursued." In New York it is said that the law does not tolerate prevarication in the service of an attorney, or permit him to use his position as such to the prejudice of the party for whom he professes to act. Such conduct deprives him of the right to claim a fee: *Andrews v. Tyng*, 94 N. Y. 16.

¹ *Murphey v. Shepardson*, 60 Wis. 412.

² *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

³ *Eliot v. Lawton*, 7 Allen, 274; 83 Am. Dec. 683.

⁴ *Hopping v. Quin*, 12 Wend. 517.

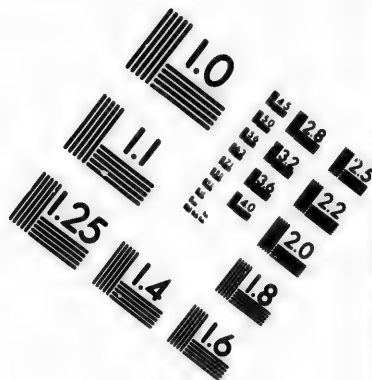
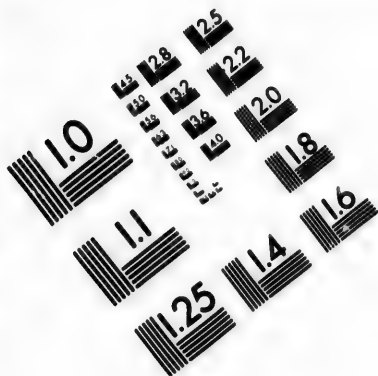
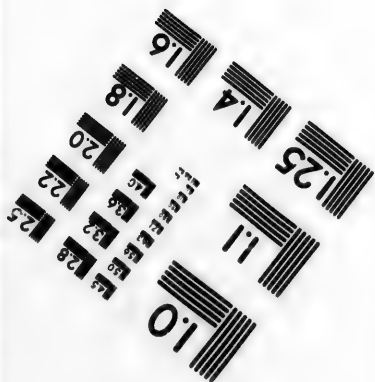
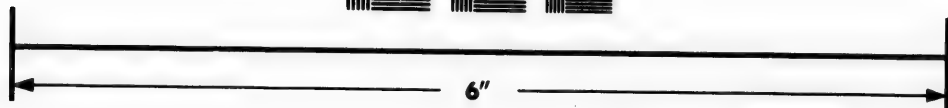
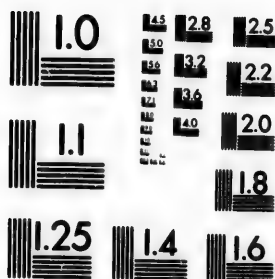


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lent conduct, this will be in violation of his duty as attorney, and will deprive him of all legal claim for his services in procuring such judgment and execution.¹ His fraud or unfaithfulness in one matter intrusted to him will not deprive him of his right to compensation for other independent services which were duly performed.² An act of impropriety or neglect on the part of an attorney in transacting his client's business, if condoned, will not defeat the right to recover for retainer and services.³ The Massachusetts statute relating to the removal and punishment of attorneys at law for deceit, malpractice, or other gross misconduct, and to their liability in damages to parties injured thereby, does not prevent the defendant, in an action by an attorney at law for services rendered, from showing that they were of no value.⁴

He cannot recover where he has collected money, and has refused or neglected to pay it over to his client after demand and until sued for it;⁵ nor where his services

¹ *Brackett v. Norton*, 4 Conn. 517; 10 Am. Dec. 179.

² *Currie v. Cowles*, 6 Bosw. 452.

³ *Gleason v. Kellogg*, 52 Vt. 14.

⁴ *Caverly v. McOwen*, 126 Mass. 222.

⁵ *Wills v. Kane*, 2 Grant Cas. 60; *Fisher v. Knox*, 13 Pa. St. 622; 53 Am. Dec. 503; *Gray v. Conyers*, 70 Ga. 349. In *Bredin v. Kingland*, 4 Watts, 420, the court say: "The third objection is, that the court erred in charging the jury that where an attorney receives money for his client, and neglects or refuses for a length of time to render an account of it, and his client is compelled to have recourse to a suit to recover his money, such attorney forfeits all right to claim any deduction as compensation for his services. In this direction we perceive no error; for why should the defendant receive compensation when he has performed no service? It amounts to nothing more nor less than the substitution of one debtor for another. The debt is not nearer collection than before; and it is apparent that if the plaintiff should be equally unfortunate in the selection of agents, the whole

amount will be consumed under pretense of collection. The retention of money by an attorney is a flagrant breach of trust, for which he renders himself liable to attachment, and in some cases, to have his name stricken from the roll. In the case of *Leonard Ellmaker's Estate*, 4 Watts, 35, the court ruled that an administrator was not entitled to commissions where he had been guilty of fraud. The same principle was decided in *Brackett v. Norton*, 4 Conn. 518; 10 Am. Dec. 179. It was there ruled that if an attorney, after having obtained final judgment and execution, prevent the collection of the execution by fraudulent conduct, this will be a violation of his duty as attorney, and will deprive him of all legal claim for his services in procuring such judgment and execution. It is the duty of an attorney, in a reasonable time, to inform his client of the receipt of money, and either transmit it to him or hold it subject to his order. A neglect or refusal to do so, or to render an account, is such fraudulent conduct as deprives him of all right to claim compensation for his services."

were, in the eye of the law, illegal or immoral;¹ nor where the services were absolutely useless;² nor where they are rendered in a litigation about officers' fees which grew out of the suit in which he was employed, the client not being interested in such litigation;³ nor where he has violated his instructions.⁴

ILLUSTRATIONS. — C., an attorney at law, agreed, for a stated compensation, to conduct the contest of a will. Against the consent of his clients, and without leave from them, he released, as their attorney, pending the suit, certain tracts of land, and received from other parties money for so executing the release. In a suit brought by C. to recover the compensation agreed upon, *held*, that evidence of the above facts was admissible, and showed a complete defense to C.'s claim under the contract: *Chatfield v. Simonson*, 92 N. Y. 209. The plaintiff, a counselor at law, instigated the defendant, with others, to en-

¹ *Trist v. Child*, 21 Wall. 441; *Arrington v. Sneed*, 18 Tex. 135; *Good-enough v. Spencer*, 46 How. Pr. 347; *Treat v. Jones*, 28 Conn. 334; *Jones v. Blackledge*, 9 Kan. 562; 12 Am. Rep. 503. Thus an attorney cannot recover for such advice to a client as would enable, if not induce, him to elude the process of the law, nor for advice to the officer serving the process, calculated to induce him to violate his duty: *Arrington v. Sneed*, 18 Tex. 135.

² *Weeks on Attorneys*, sec. 335. In *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179, the court say: "I will assume the facts to be as they were suggested in the argument, and as I understood, not contradicted; that having fraudulently defeated the collection of the execution, and having omitted to give any information of this fact to the defendant, the plaintiff was requested to bring a suit against the sheriff, which, by reason of the culpable act of the plaintiff, was defeated. To recover for his services in the action aforesaid is one object of the present suit. I do not admit that any authority except what was originally given to pursue the requisite measures for collecting the defendant's debt was legally necessary; but the consideration of this subject, as being of no importance in this case, I shall waive. Had the fact been fully known

by the defendant, and after this he had thought proper to invest the plaintiff with authority to bring the suit in question, I should not consider his services as invalidated by the antecedent fraud. But the suppression of the truth, in this important particular, if such were the fact, was itself a fraud, and contaminated all the subsequent acts of the plaintiff. On the supposition assumed, the plaintiff knew that by fraud he had prevented the collection of the execution, and that a recovery against the sheriff was impossible. With this knowledge not communicated to the defendant, but confined in his own breast, he commenced a hopeless suit, which, as he must have anticipated, was determined against his client. Having violated his duty by the perpetration of a fraud, and by this act occasioned to the defendant the loss of his debt, he now demands remuneration for his faithless services. The ground of a mere precedent, if it existed, must be unquestionable to sanction the reward of such misconduct, and much more to authorize the establishment of a principle that will protect and invite results so flagrantly unjust."

³ *Burns v. Aller*, 15 R. I. 32; 2 Am. St. Rep. 844.

⁴ *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24.

gage in a riot, and promised to defend them if they were prosecuted. The defendant was prosecuted, and employed the plaintiff to defend him. The plaintiff afterwards sued him for his services and disbursements in defending him. *Held*, that he could not recover: *Treat v. Jones*, 28 Conn. 334.

§ 206. Attorney may Make Special Contract for Compensation.—Even where a fee bill is provided by law, an attorney may make an express and special contract with his client for extra compensation.¹ But the courts scrutinize such agreements with great care, and the burden is on the attorney to show that the contract was just and fair, and that the client has not been taken advantage of.² Therefore, every special agreement for compensation between attorney and client is not good. As said in a Tennessee case,³ it is essential that “the means used to obtain the contract be free, not only of fraud, actual or constructive, but also of any other inequitable consideration; that every material circumstance or fact connected with the execution of the contract, and calculated to inform the client of his rights and responsibilities, be declared to him without reservation; that the attorney inform himself of all such facts and circumstances which would reasonably come within the knowledge of, and which would likely prevent the execution of the contract by, the client; that he does not contract for a greater benefit than his services are reasonably worth, with reference to the trouble and difficulties of the particular case, amount involved,

¹ *Wallis v. Loubat*, 2 Denio, 607; *Lecatt v. Sallee*, 3 Port. 115; 20 Am. Dec. 249; *Lender v. Caldwell*, 4 Kan. 339; *Easton v. Smith*, 1 E. D. Smith, 318; *Jenkins v. Williams*, 2 How. Pr. 261; *McElrath v. Dupuy*, 2 La. Ann. 521; *Porter v. Parmly*, 39 N. Y. Sup. Ct. 219; *Blaisdell v. Ahern*, 144 Mass. 393; 59 Am. Rep. 99.

² *Haight v. Moore*, 5 Jones & S. 161; *McMahan v. Smith*, 6 Heisk. 167; *Mason v. Ring*, 3 Abb. App. 210; *Ford v. Harrington*, 16 N. Y. 285; *Evans v. Ellis*, 5 Denio, 640; *Dickinson v. Brad-*

ford, 59 Ala. 581; 31 Am. Rep. 23; *Allison v. Scheeper*, 9 Daly, 365; *Chester Co. v. Barber*, 97 Pa. St. 455; *Gruby v. Smith*, 13 Ill. App. 43; *Yonge v. Hooper*, 73 Ala. 119. Nothing in the law of Texas prohibits an attorney from contracting in good faith for a contingent fee: *Stewart v. Houston and Texas Central R'y Co.*, 62 Tex. 246; *Waterbury v. Laredo*, 68 Tex. 565. See title Contracts, Champerty and Maintenance.

³ *Planters' Bank v. Hornberger*, 4 Cold. 531.

either of a pecuniary character or reputation personally, etc.; that the *onus* shall devolve on the attorney to show that the contract was free from all fraud, undue influence, and exorbitancy of demand; that the attorney, having performed his part of the contract reasonably, and with due skill and diligence, without regard to the result of the litigation, shall be entitled to recover the amount specified, provided he brings the contract within the foregoing principles. In the absence of a contract, the attorney is entitled to recover on a *quantum meruit* for such labor as he shall have performed." An attorney cannot stipulate for a compensation incommensurate with the services to be performed. The *onus* is upon him to show his contract for compensation to be just and reasonable.¹ In New York an attorney is not prohibited from taking in advance a mortgage to secure payment of his costs yet to be earned in a suit.² An attorney who has made a special contract with his client to prosecute a case to its final termination cannot recover for his services on a *quantum meruit*. The parties must be governed by their contract, and it is for the jury to say whether there was a special contract or not.³ He cannot recover more than he agreed to receive by proof that his services were worth more.⁴ The power of the court to reform contracts between attorney and client is limited to the duty of protecting the latter against the undue influence of the former. It cannot, therefore, increase the amount of compensation agreed on by special contract as the value of the attorney's services.⁵ A contract to render services for a contingent fee may be valid, although it is understood that the attorney will be, as in fact he was, an indispensable witness on the trial of his client's case.⁶ An attorney who is by agreement to receive a certain per cent on recovery is not

¹ Newman v. Davenport, 9 Baxt. 538; McMahan v. Smith, 6 Heisk. 167.

² Hall v. Crouse, 13 Hun, 557.

³ Bull v. St. Johns, 39 Ga. 78.

⁴ Coopwood v. Wallace, 12 Ala. 790.

⁵ Lewis v. Yale, 4 Fla. 418.

⁶ Perry v. Dicken, 105 Pa. St. 83; 51 Am. Rep. 181.

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a necessary party plaintiff, and need not be joined as such.¹ Where he has agreed to attend to all of a person's legal business without charge, in consideration of being furnished with offices without charge, and he is called upon to bid in land for such client, which he does, and assists in leasing the same, even if the services do not strictly fall within his contract, he will have no right to have their value estimated upon the basis of commissions.² So where he takes a written power of attorney to transact and manage certain business for his client, which fixes his compensation for his services and trouble at twenty-five per cent of the net sum realized by him, if, instead of attending to the business himself, he employs other attorneys, he will have no right to charge their fee to his client in addition to his commissions, and he will have no right to charge a fee for his legal services above the compensation provided in the contract.³ And where he argues a case for an agreed sum at one term, and charges more for a second argument of the same case, it is a question of fact whether he is entitled to the same or other compensation.⁴ Under a contract to pay an attorney one third of the property to be recovered by way of compensation, the fees of counsel employed, not by him, but by a third person, are not chargeable to the attorney's share.⁵ On the question whether litigation has been successful, so that an attorney has earned a contingent fee, substantial, not absolute, success may in some circumstances entitle the attorney to his fee.⁶

ILLUSTRATIONS.—A mortgage stipulated that "in the event of foreclosure, sixty dollars attorney's fees shall be by the court also taxed and included in the decree and foreclosure." *Held*, that the mere commencement of foreclosure proceedings did not entitle plaintiff to collect the attorney's fees, and that if, before decree, defendant tenders to plaintiff the amount of the

¹ McDonald v. R. R. Co., 26 Iowa, 124; 96 Am. Dec. 114.

² Dyer v. Sutherland, 75 Ill. 583.

³ Hughes v. Zeigler, 69 Ill. 38.

⁴ Strong v. McConnel, 5 Vt. 338.

⁵ In re Hynes, 105 N. Y. 560.

⁶ Cole v. Richmond Mining Co., 18 Nev. 120.

mortgage and costs accrued, he is discharged from all further liability: *Schmidt v. Potter*, 35 Iowa, 426. On an agreement to pay a law firm for defending a suit in the United States circuit court, and if necessary in the United States supreme court, for one thousand dollars in cash, and such further sum "as may be fair, reasonable, and just under all the circumstances," *held*, that no action lay before the time for suing out a writ of error had expired: *Holly Springs v. Manning*, 55 Miss. 380. M. being indicted for counterfeiting, his brother gave R., an attorney, six hundred dollars cash, and a note for four hundred dollars, under an agreement that R. should procure M.'s acquittal and discharge at a specified term of court; but M. failed to appear thereat and answer. *Held*, that the contingency not having occurred, R. could not recover on the note; but R. could retain of the money sufficient to compensate him for his services in good faith rendered under the agreement before ascertaining that its performance had become impossible: *Moore v. Robinson*, 92 Ill. 491. An attorney received about sixty thousand dollars' worth of claims for collection. The rate of compensation agreed upon when the claims were given to him was five per cent upon the amount collected. After collecting most of the claims the contract was abandoned by mutual consent. The attorney claimed, in addition to his percentage upon the amount of claims collected, the value of services actually rendered in connection with the uncollected claims: *Held*, that he was entitled to nothing on account of these claims: *Bruce v. Baxter*, 7 La. 477. An attorney agreed with a county, against which *mandamus* was pending to compel the issue of certain bonds, to defend the suits relating thereto for a stipulated fee, and for a further sum to be paid "in the event the county shall not be obliged to issue said bonds," or in the event of a compromise without the attorney's consent, and to be paid when "the validity of the bonds is determined in favor of said county." A suit was pending concerning similar bonds already issued, and the supreme court decided these bonds to be invalid. The attorney thereupon claimed his contingent fee to have been earned. *Held*, that to declare bonds already issued invalid was a different thing from preventing their issuance, and that the contingency had not arrived when the attorney could claim that his fee was earned: *Richland v. Millard*, 9 Ill. App. 396.

§ 207. Special Contracts for Compensation Sustained.

—Tested by the principles in the last section, the following agreements between attorney and client have been held good: an agreement that the attorney shall have a

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percentage on the amount recovered in the suit;¹ that the attorney shall be first paid out of the sum recovered;² that the costs recovered in the suit shall belong to the attorney;³ an agreement, after judgment recovered, that the attorney shall have half of it when collected;⁴ a parol assignment of a cause, by a plaintiff to his attorney, in consideration of the attorney's former services and advancements;⁵ an agreement by an attorney to commence and conduct and pay all the expenses of a suit, and give the plaintiff a certain share of the proceeds.⁶ An attorney at law may stipulate to prosecute a claim against the United States for a contingent fee, and a contingent fee of fifty per cent may, under certain circumstances, be not an exorbitant fee.⁷ A defendant has a right to assign to his attorney the prospective costs against his adversary, in consideration of the services to be rendered by the attorney in earning such costs, and where such transfer has been made, in case the defense is successful, the claim of the attorney to a judgment for the costs cannot be defeated by setting off against the same a prior judgment in favor of the plaintiff against the defendant.⁸ An agreement made by an attorney with a client to render his professional services, "in the courts of this state," in actions to test the validity of the client's title to certain real estate, in consideration of

¹ *Benedict v. Stuart*, 23 Barb. 420; *Regan v. Martin*, 18 Wis. 672; *Wilhite v. Roberts*, 4 Dana, 172; *Mayor v. Gibson*, 1 Pat. & H. 48; *Ex parte Plitt*, 2 Wall. Jr. 453; *Bayard v. McLane*, 3 Harr. (Del.) 139; *Tapley v. Coffin*, 12 Gray, 420; *Ogden v. Des Arts*, 4 Duer, 275; *Evans v. Bell*, 6 Dana, 479; *Schomp v. Schenck*, 40 N. J. L. 155; 29 Am. Rep. 279; *McDonald v. Chicago etc. R. R. Co.*, 29 Iowa, 170; *Hoffman v. Vallejo*, 45 Cal. 564; *Moses v. Bagley*, 55 Ga. 283; *contra*, *Holloway v. Lowe*, 7 Port. 480; *Satterlee v. Frazer*, 2 Sand. 141; *Elliott v. McClelland*, 17 Ala. 206; *Dumas v. Smith*, 17 Ala. 305; *Boardman v. Thompson*, 25 Iowa, 427.

² *Christie v. Sawyer*, 44 N. H. 248. In New Jersey where there are no laws against champerty and maintenance, an attorney assigned to assist a poor woman in recovering one thousand dollars, and three hundred dollars interest due on a policy, may stipulate for one half the amount in case of success, he to have nothing otherwise; *Hassell v. Van Houten*, 39 N. J. Eq. 105.

³ *Ely v. Cooke*, 28 N. Y. 365.

⁴ *Floyd v. Goodwin*, 8 Yerg. 484; 29 Am. Dec. 130.

⁵ *Jordan v. Gillen*, 44 N. H. 424.

⁶ *Fogerty v. Jordan*, 2 Robt. 319.

⁷ *Taylor v. Bemiss*, 110 U. S. 42.

⁸ *Perry v. Chester*, 53 N. Y. 240.

a conveyance by the client to the attorney of a portion of the land, does not bind the attorney to render his services in an action brought to test the validity of the same title in the circuit court of the United States of that state.¹ An attorney cannot recover on an agreement by his client to pay him for services when the agreement was brought about by his fraudulent misrepresentations as to the amount which would be recovered in a suit, and by threatening to withhold and destroy valuable papers relating to suits in which he was acting for his client.² Under a contract to pay an attorney a percentage "on all amounts collected," the attorney is entitled to his percentage, although the claim is paid without his interference.³

ILLUSTRATIONS. — It was agreed that an attorney should take such legal proceedings as to him should seem fit to vacate certain assessments. He took proceedings to vacate some of them, but not all, rightly believing that in the case of the others proceedings would be unavailing. *Held*, that he was entitled to the compensation agreed on: *Deering v. McCahill*, 51 N. Y. Sup. Ct. 263.

§ 208. **Special Contracts for Compensation not Sustained.** — But the following have been held invalid: an agreement between attorney and client that the former shall defend the suit in consideration of the rents and profits of the land in question during the litigation;⁴ an agreement after the attorney had been employed, by which greater compensation is given to him.⁵ A written contract between a county and an individual, which shows upon its face that it was made by the county for the professional services of the individual as an attorney, which services are such as the law requires to be performed by the county attorney, is *prima facie* void.⁶

¹ *Mahoney v. Bergin*, 41 Cal. 423.

² *Judah v. Vincennes University*, 23 Ind. 273.

³ *Jacks v. Thweatt*, 39 Ark. 340.

⁴ *Merritt v. Lambert*, 10 Paige, 352. See title Contracts, Champerty.

⁵ *Lecatt v. Sallee*, 3 Port. 115; 29 Am. Dec. 249.

⁶ *Clough v. Hart*, 8 Kan. 487. In a New York case an attorney at law acquired knowledge of an unclaimed savings bank deposit. He induced A,

§ 209. Special Contract for Complete Service — Completion of Service Interrupted. — Where there is a special contract between attorney and client for a stipulated fee for prosecuting the suit to its termination, and the attorney, after rendering part of the services, is prevented by a cause not within his control from completing his contract, he is entitled to be paid the reasonable value of his services.¹ Thus, if he becomes incapable of acting further on account of being elected to the bench, he may recover for what he has already done.² A note given for a fee may be collected though the cause be compromised before the payee has performed all the services he was expected to render.³ So where, under the circumstances, the attorney dies before the cause is determined, his administrator may recover a *quantum meruit*.⁴ A contract with an attorney to present a claim against a foreign government, for a stipulated proportion of the amount recovered, is not dissolved by the death of the claimant after services have been rendered, but creates a lien on the money, when subsequently recovered, which is a foundation for jurisdiction in equity.⁵ The retainer of an attorney in a criminal case makes it his duty to render all his professional services up to final judgment and the end of the case. Where a note is given for the fee, the death of the maker at the hands of a mob before trial constitutes a partial failure of consideration.⁶

ILLUSTRATIONS. — Indictments were found and drawn up during the term of a circuit attorney, and he performed all the

one of the next of kin of the deceased depositor, to procure himself to be appointed administrator, and to agree to give the attorney one half of the deposit as compensation for the attorney's services in securing it. A afterwards refused to carry out the agreement. It was held that the attorney was not entitled to a judgment against A, who was insolvent, to be paid out of the estate: *Murphy v. Banderet*, 13 Daly, 385.

¹ *Morgan v. Roberts*, 38 Ill. 65; *Major v. McLester*, 4 Ind. 591.

² *Baird v. Ratcliff*, 10 Tex. 81.

³ *McLain v. Williams*, 8 Yerg. 230.

⁴ *Coe v. Smith*, 4 Ind. 79; 58 Am. Dec. 618; *Baylor v. Morrison*, 2 Bibb, 103; *Clendinen v. Black*, 2 Bail. 488; 23 Am. Dec. 149.

⁵ *Wylie v. Coxe*, 15 How. 416.

⁶ *Agnew v. Walden*, 84 Ala. 42.

actual services which were rendered, and the cases were continued and not brought to trial, and no services were rendered in them by his successor. *Held*, that the fees thus accruing belonged to the former: *Vastine v. Voullaire*, 45 Mo. 504. A law firm began the defense of an equity suit, receiving their entire fee in advance, and one of the firm dying, the surviving partner conducted the suit to its conclusion. *Held*, that he could not claim additional compensation in the absence of a new contract: *Dowd v. Troup*, 57 Miss. 204. W., an attorney, was engaged by the city of Detroit to prosecute a particular cause for the city, and was to be paid the value of his services. While the cause was pending he was elected city counselor, under ordinances which required the city counselor to prosecute all the city law business, and gave a stated salary therefor. *Held*, that his salary must be deemed to cover all services rendered after his becoming city counselor. His election to and acceptance of that office terminated, by implication, the previous engagement, and his right to recover for services under it: *City of Detroit v. Whittemore*, 27 Mich. 281.

§ 210. **By Withdrawal from Case.**—If an attorney withdraws from a case with the consent of his client, he does not lose his right to compensation for services already rendered.¹ If he abandons the case he cannot recover on his special contract, though he may on a *quantum meruit*. If the client employ a certain firm or association of lawyers, one cannot abandon the case, and the others carry out the contract.² The attorney is justified in withdrawing by the client's failure to supply him with funds to carry on the litigation.³

§ 211. **By Dismissal of or from Case.**—If the attorney is dismissed by his client without cause, he may recover for the services rendered, and perhaps the stipulated fee for the whole case.⁴ If a client prevents his attorney from

¹ *Coopwood v. Wallace*, 12 Ala. 790.

² *Morgan v. Roberts*, 38 Ill. 65. In *Simon v. Brashear*, 9 Rob. (La.) 59, 41 Am. Dec. 321, it was said that business intrusted to two professional men may be attended to by either.

³ *Weeks on Attorneys*, sec. 365.

⁴ *Myers v. Crockett*, 14 Tex. 259. Where an attorney at law is employed to defend a suit at an agreed compensation, and fully performs his agreement until discharged without cause, the measure of his damages is the compensation named in the contract: *Webb v. Trescony*, Cal. 1888.

completing the services contracted for, the attorney may recover as though he had fully performed them.¹ A client cannot, at his own option, by the employment of additional counsel, reduce the amount of the compensation or fee which he had stipulated to pay to the original attorney.² An attorney at law is entitled to claim commissions upon judgments obtained through his agency, as well as upon moneys actually collected on executions, and accounted for to his clients, although he be superseded by the appointment of another attorney.³ If the client dismisses the suit without the attorney's consent, thereby preventing him from completing his contract to the end, it is held by some courts that he may, and by others that he may not, recover the stipulated fee for the full service.⁴ But such a contract gives him no right which can prevent or affect the settlement or compromise of the suit by the client.⁵ If the fees of an attorney are contingent on success, and the client settles the suit without the attorney's consent, the attorney can recover what his services were worth.⁶ If, by compromise between the plaintiff and defendant, after judgment, the defendant agrees to pay the counsel fees of plaintiff in the case, such agreement is not binding on the attorney, and he may, notwithstanding the agreement, recover from his client a fair compensation for his services.⁷

¹ Kersey v. Garton, 77 Mo. 645.

² Randall v. Archer, 5 Fla. 438; Morgan v. Brown, 12 La. Ann. 159.

³ Morel v. New Orleans, 12 La. Ann. 485; Commandeur v. Carrollton, 15 La. Ann. 7.

⁴ Hill v. Cunningham, 25 Tex. 25; Hunt v. Test, 8 Ala. 16; Polsley v. Anderson, 7 W. Va. 202; 23 Am. Rep. 613. Where an attorney has agreed to prosecute an action, for a compensation to be contingent on success, and is diligently prosecuting it, the client cannot, by settling the action without his consent, deprive him of his right

to compensation. On a settlement so made, the attorney is at least entitled to be paid in proportion to the sum received by the client in settlement of the action: Marsh v. Holbrook, 3 Abb. App. 176.

⁵ Kusterer v. City of Beaver Dam, 56 Wis. 471; 43 Am. Rep. 725; Lamont v. Washington etc. R. R. Co., 2 Mackey, 502; 47 Am. Rep. 268; Miller v. Newell, 20 S. C. 122; 47 Am. Rep. 833; Roberts v. Doty, 31 Hun, 128.

⁶ Quint v. Ophir etc. Mining Co., 4 Nev. 304.

⁷ Safford v. Carroll, 23 La. Ann. 382.

ILLUSTRATIONS. — An attorney had a special contract with his client to perform certain services, but was wrongfully prevented by the client from completing them, the attorney having at all times continued ready to serve. *Held*, that he could claim the entire amount agreed upon, less such expenses as he would have incurred, but not charged to his client, had he completed his task according to agreement: *Brodie v. Watkins*, 33 Ark. 545; 34 Am. Rep. 49. An attorney was appointed by a bank for the term of two years, with an agreement that he should receive a certain commission upon all collections made by him. *Held*, entitled to such commission on the amount of a judgment, on which execution issued before his term expired, but which was not received by him till after the expiration of his office: *State v. Hawkins*, 28 Mo. 366. An attorney received notes for collection, on an agreement to charge nothing until they were collected, and then to have eight per cent. He prosecuted the notes to judgment, but did no more. Seven years afterwards, the client, with this attorney's consent, employed another attorney, who collected the indebtedness. *Held*, that the first attorney was not entitled to any compensation: *Rousseau v. Marriencaux*, 28 La. Ann. 293. A employed B, an attorney, to collect a decree rendered in his favor, and agreed in writing to give him a certain sum when he should collect it. Before B had collected the whole of the decree, A became dissatisfied, and employed another attorney to collect the balance, and brought suit against B for the amount he had collected. *Held*, recoverable on the ground that if the contract was in force, the stipulated compensation could not be claimed by B, as he had not collected the whole amount decreed, and if the contract was broken and rescinded, he was entitled only to a reasonable compensation for his services, and perhaps damages for the breach of the contract, which amount could not be set off against A's claim, as he had filed neither special plea, notice, nor counterclaim: *Scobey v. Ross*, 5 Ind. 445. A creditor left a claim with a lawyer for collection, and among other things agreed that in case he should himself "settle, compromise, or receive, or in any way dispose of the claim," the attorney should be allowed twenty-five per cent. *Held*, that the mere taking by the creditor of the debtor's note, without security or payment, did not entitle the attorney to his commission: *Mills v. Fox*, 4 E. D. Smith, 220. An attorney was employed to defend a party on a criminal charge, for a fixed price, to be paid after the services were rendered. He tendered his services, which were refused, the defendant saying that his wife had employed other counsel. The attorney told defendant he was ready to comply with his contract, and would make him do so,

but afterwards volunteered in the prosecution, and conducted the case against defendant. *Held*, that this action was an abandonment of the contract, and that the plaintiff, the attorney, could not recover in an action for the fee: *Cantrel v. Chism*, 5 Sneed, 116. An attorney agreed with a father to institute proceedings for the division and sale of land held by the father and his daughter in common, and the father agreed to pay for such services five hundred dollars when the land should be sold and the purchase-money become due, or the usual fee in case the attorney should fail to procure the division. The father died after an order for the sale had been entered by the court, but before the sale had taken place; and the guardian of the daughter had the suit dismissed. *Held*, that the attorney was only entitled to the usual fee for his services: *Bunn v. Prather*, 21 Ill. 217. An action was brought for the specific performance of a contract for the sale of real property, and after issue, but before trial, the parties made a settlement of the subject of the action, notwithstanding which the defendant's attorney insisted upon proceeding with the action unless his costs were paid. The plaintiff thereupon moved for a dismissal of the action. *Held*, that as in fact there was no longer a controversy between the parties, the action should not be continued at their expense, either for the profit or emolument of others, and that the motion for discontinuance should be granted: *Sullivan v. O'Keefe*, 53 How. Pr. 426. After action brought and sent to referee for trial, the parties settled, and plaintiff gave a release to defendant, who agreed to pay all costs. Defendant moved for a discontinuance, and an order was entered, directing discontinuance on payment of plaintiff's taxable costs. Plaintiff's attorney showed, upon the motion, that the agreement between him and his client was, that he should not charge the plaintiff personally for services or disbursements, but that he should be paid out of the amount collected a fee contingent on recovery; but it did not appear, as matter of fact, that any amount beyond taxable costs and disbursements was due to him. *Held*, that upon these facts the court should not have held, as matter of law, that the attorney for the plaintiff was entitled to an allowance for compensation beyond the taxable costs and disbursements: *Wright v. Wright*, 41 N. Y. Sup. Ct. 432. An attorney agreed with his client to bring a suit for him against a railroad company, for a personal injury, in consideration of one half the damages recovered, the attorney to pay the expenses of the litigation. When the summons was served upon one of the directors of the company, he was notified of this arrangement, and forbidden to settle with the client. Notwithstanding, the company compromised the

matter with the client, and took a release from him, which they set up in their answer, as a defense to the suit. *Held*, that although such release should not be set aside, it was void as against the attorney; and that the referee before whom the case was tried should have gone on and assessed plaintiffs' damages, and given judgment against defendant for one half the amount of such damages:¹ *Coughlin v. N. Y. Central etc. R. R. Co.*, 8 Hun, 136. An attorney was employed to prosecute a claim before the treasury department for one half the sum to be recovered. After filing the papers, etc., he was disbarred from further practice in the department. *Held*, that the contract fell to the ground, but that, for services in fact rendered, he was entitled to a reasonable compensation, and that it made no difference that after his disbarment, and the employment of other counsel, the order of disbarment was revoked: *Moyers v. Graham*, 15 Lea, 57.

¹ Otherwise, where defendant had *Walsh v. Flatbush etc. R. R. Co.*, 11 no notice of the attorney's rights, and *Hun*, 190. made the settlement in good faith:

PART III.—AUCTIONEERS.

CHAPTER XVIII.

AUCTIONEERS.

- § 212. Nature and effect of sales by auction.
- § 213. Auctioneer defined, etc.
- § 214. Duties of auctioneer.
- § 215. Powers possessed by auctioneer.
- § 216. Auctioneer as agent of both — *Statute of frauds*.
- § 217. Powers not possessed by auctioneer.
- § 218. Liabilities of auctioneers.
- § 219. Liabilities and rights of bidders.
- § 220. Fictitious bids — “Puffers” — Agreements not to compete.
- § 221. The auctioneer's compensation.

§ 212. **Nature and Effect of Sales by Auction.**—An auction is a public sale of property to the highest bidder.¹ The bidding at an auction is an offer by the bidder which is not binding on either side until assented to, which assent is signified on the part of the seller by knocking down the hammer. Therefore a bid may be retracted before the hammer goes down.² Putting up goods publicly for sale at a certain high price, and then gradually lowering the price till some one accepts it as a buyer, is a sale at auction.³ By advertising that the property is to be sold “without reserve,” one contracts with the highest *bona fide* bidder that the sale shall be without reserve; and the contract is broken if during the auction a bid is made by or on behalf of the owner of the property sold, and in such case the auctioneer is liable to an action at

¹ *Rex v. Taylor*, 13 Price, 636; 3 Term Rep. 148; *Warlow v. Harrison*, 1 El. & E. 295; *Ives v. Tregent*, 29 Mich. 390.
Campbell v. Swan, 48 Barb. 109; *Crandall v. State*, 28 Ohio St. 479; *Walker v. Advocate*, 1 Dow, 111.

² 2 Kent's Com. 537; *Payne v. Cave*,
³ *Deposit v. Pitta*, 18 Hun, 475.

the suit of the highest *bona fide* bidder.¹ When property is advertised to be sold "without reserve," such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can under any possible circumstances affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser.² Therefore any arrangement by him with others, the result of which will be to prevent a sale under a fixed sum, will operate to avoid the sale.³ But the owner may cause the auctioneer to publicly announce that no bids less than five cents will be received; and after such notice a person who bids only one cent in advance of a previous bid, although the previous bid was one left by an absentee, acquires no title to the article upon which he bid.⁴ A bid may likewise be retracted or withdrawn by the auctioneer withdrawing the article bid on and passing to something else,⁵ or adjourning the sale.⁶

If the description of the property sold be substantially true, and the purchaser gets what he bargained for, with only slight defects, he will generally be held to abide by the purchase, with an allowance from the price by way of compensation.⁷ Where the owner advertises a lot of very valuable property to be sold at auction, and only offers for sale articles of very little value, this fraud has no effect upon any particular sale effected at the auction.⁸ But if while the auctioneer is selling goods of one man another procures him to sell his goods, without informing him whose they are, it is a fraud, both on the auctioneer and on the bidders, such as would entitle him to whom the goods were sold to repudiate the sale upon the dis-

¹ Warlow v. Harrison, 29 L. J. Q. B. 14; 6 Jur., N. S., 66; 1 El. & E. 295; in Exchequer, 5 Jur., N. S., 313; 28 L. J. Q. B. 7.

² Robinson v. Wall, 2 Phill. Ch. 372; 11 Jur. 577; 16 L. J. Ch. 401.

³ Davis v. Petway, 3 Head, 667; 75 Am. Dec. 789.

⁴ Farr v. John, 23 Iowa, 286; 92 Am. Dec. 426.

⁵ Donaldson v. Kerr, 6 Pa. St. 486.

⁶ Wharton on Agency, sec. 640.

⁷ 2 Kent's Com. 537; Ashcom v. Smith, 2 Penr. & W. 211; 21 Am. Dec. 437.

⁸ Farr v. John, 23 Iowa, 286; 92 Am. Dec. 426.

covery of the fraud.¹ The advertisement is no part of the conditions of sale, and does not bind the vendor unless expressly made so.² Conditions of sale read before the biddings commenced, but not annexed to the catalogue on which the purchasers' names were entered or referred to therein, cannot supply the terms of sale omitted from the catalogue.³ As between the seller and the purchaser of the goods at auction, evidence is admissible to vary the conditions of the sale publicly stated.⁴ But the printed conditions upon which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of the sale, except for the purpose of showing fraud. Hence parol evidence that is not repugnant to the printed terms of sale, but consistent with and explanatory of them, is admissible. Thus where the wrecks of vessels lying in a river are sold by name as lying at certain localities, evidence is admissible to show that the materials were lying in the river at the localities named, and that the names were wrongly given, the wrecks being incapable of identification by their names, and being masses of rubbish rather than specific chattels.⁵ Specific performance of a sale by auction may be decreed.⁶ An action on the case lies for the disturbance of a sale by

¹ *Thomas v. Kerr*, 3 Bush, 610; 96 Am. Dec. 262.

² In *Ashcom v. Smith*, 2 Penr. & W. 211, 21 Am. Dec. 437, it is said: "The office of an advertisement, both here and in England, is to give notice of the fact that a sale is intended, and the object of the description is to attract bidders, leaving the terms to be settled on the ground. Even were the conditions published beforehand, the vendor would not be precluded from changing them, as he may sell on his own terms, or not at all. The conditions are, therefore, superadded as a distinct matter by the auctioneer, and published by parol or in writing. Where, indeed, the advertisement is referred to as containing the conditions, it will no doubt answer the purpose; but it is not pretended here that the land was sold by the advertisement, or in gross, or as containing a definite quantity, or any other way than by the acre."

³ *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243.

⁴ *Mitchell v. Zimmerman*, 109 Pa. St. 183; 58 Am. Rep. 715.

⁵ *Chouteau v. Goddin*, 39 Mo. 229; 90 Am. Dec. 462.

⁶ *King v. Bardeau*, 6 Johns. Ch. 38; 10 Am. Dec. 312.

auction.¹ A sale of a number of articles or pieces of property constitutes but one contract, though they are separately struck off at different prices.² A lease of real estate for five years, by auction, to the highest bidder is not a "sale of real estate" within a Massachusetts statute.³

ILLUSTRATIONS.—A testator ordered that his estate should be sold by "auction." It was advertised for sale on a certain day, but before that time a person, by letter, offered a certain price for it. On the day named the estate was put up, but no one bidding as much as the offer by letter, it was withdrawn and conveyed to the writer. *Held*, that this was a sale by auction: *Tyree v. Williams*, 3 Bibb, 365; 6 Am. Dec. 663. A municipal ordinance provides that certain property shall be sold at public auction, and that the city reserves the right to reject any bid not deemed satisfactory and for the best interests of the city. *Held*, that this does not reserve any greater right than the city would have had without the ordinance, and a bid cannot be rejected after the hammer is brought down: *Kerr v. City*, 1 Leg. Gaz. Rep. 254. At the sale of premises, the vendor invited each bidder to put down two sums on a slip of paper, and upon collating such biddings, he whose paper contained the highest bidding was to be declared the purchaser at the lowest of the two sums, if that exceeded the highest of any bidder. *Held*, that this was a sale by "auction," and that the vendor incurred the penalty as an auctioneer without being licensed, although the purchase was never completed: *Rex v. Taylor*, McClell. 362; 13 Price, 636. A., on the sale of a barge by auction, under an execution, addressed the company, stating that he had built it for a person against whom the execution was issued, who had not paid him for it; on which no person bid against him, the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding. A. advanced one shilling more, and paid a deposit as part of the purchase-money. *Held*, that he did not acquire any property in the barge under such sale: *Fuller v. Abrahams*, 6 Moore, 316; 3 Ball & B. 116.

§ 213. **Auctioneer Defined, etc.**—An auctioneer is one who is authorized to sell goods or merchandise at public

¹ *Furness v. Anderson*, 1 Pa. L. J. 324; and see *Like v. McKinstry*, 3 Abb. App. 62.

² *Coffman v. Hampton*, 2 Watts & S. 377; 37 Am. Dec. 511; *Dykes v. Blake*, 4 Bing. N. C. 463; *Mills v. Hunt*, 17

Wend. 333; *Jenness v. Wendell*, 51 N. H. 63; 12 Am. Rep. 48; *contra*, *Messer v. Woodman*, 22 N. H. 172; 53 Am. Dec. 241; *Van Eps v. Schenectady*, 12 Johns. 436; 7 Am. Dec. 330.

³ *Sewall v. Jones*, 9 Pick. 412.

auction or sale for a commission. He usually acts under a license from the state, under regulation—as a license, the giving of bond, etc.—prescribed by statute.¹ He may be verbally authorized to sell lands,² and his authority is revocable by his principal.³ A shopkeeper who, in selling goods, adheres to his fixed retail price is not amenable to the charge of violating a statute prohibiting sales at auction without a license, by reason that he employs outcries and loud offers of the goods, to all persons present, in manner like that of auctioneers. The essential feature of an auction, within such a statute, is the endeavor to increase the price by means of competition among bidders.⁴ A note for goods previously bought at a sale by an unlicensed auctioneer, and delivered to the purchaser, is valid.⁵ An auction sale by one not licensed as an auctioneer will not avoid the conveyance to an innocent purchaser without knowledge that the auctioneer was not licensed, although it may render the seller liable to a penalty.⁶

§ 214. **Duties of Auctioneer.**—The duties of an auctioneer are to use reasonable skill and diligence in his business;⁷ to keep the goods intrusted to his care as a

¹ *Brown v. State*, 12 Wheat. 443; *State v. Conkling*, 19 Cal. 501; *Clark v. Cushman*, 5 Mass. 505; *State v. Rucker*, 24 Mo. 557; *Hunt v. Philadelphia*, 35 Pa. St. 277; *City Council v. Paterson*, 2 Bailey, 165; *Davis v. Commonwealth*, 3 Watts, 297; *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327; *Jordan v. Smith*, 19 Pick. 287; *State v. Poulterer*, 16 Cal. 514; *Fretwell v. Troy*, 18 Kan. 271; *Waterhouse v. Dorr*, 4 Me. 333; *Sewall v. Jones*, 9 Pick. 412; *McMechen v. Mayor*, 3 Har. & J. 534; *Commissioners v. Holloway*, 3 Hawks, 234.

² *Yourt v. Hopkins*, 24 Ill. 326; *Cossitt v. Hobbs*, 56 Ill. 233; *Doty v. Wilder*, 15 Ill. 407; 60 Am. Dec. 756. ³ *Taplin v. Florence*, 10 Com. B. 744.

⁴ *Crandall v. State*, 28 Ohio St. 479.

⁵ *Gunnaldson v. Nyhus*, 27 Minn. 440.

⁶ *Williston v. Morse*, 10 Met. 17.

⁷ "I pay an auctioneer," said Lord Ellenborough, in *Denew v. Daverell*, 3 Camp. 451, "as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess, and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for a recompense, although from a misplaced confidence I followed his advice without remonstrance or suspicion." In *Hicks v. Minturn*, 19 Wend. 550, it is said: "Like other professional men or

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prudent man would keep his own;¹ to account to his employer;² to obey the instructions of his principals;³ to sell for cash when instructed to do so, and not to take a check.⁴ Doubts about the identity of the property or its title will justify the auctioneer in postponing the sale.⁵ Paying over the proceeds of an auction sale to the person for whom he sells is one of the official duties of an auctioneer. Hence, neglect so to pay over constitutes breach of a bond conditioned simply that the auctioneer shall well and faithfully perform all the duties of said office during his continuance therein.⁶ Where auctioneers, who were not authorized to sell a house and lot for less than \$2,800, struck the same off to the plaintiff for \$2,250, it was held that the contract was not binding upon the owner, but that the auctioneers were personally bound by it.⁷

§ 215. Powers Possessed by Auctioneer.—He may sue for the property or the price in his own name,⁸ or in the

agents, auctioneers assume upon themselves an obligation to their employers to perform the service confided to them with ordinary care and skill, and become responsible in default of either; in other words, they are responsible for loss arising from gross negligence or ignorance. Beyond this their duties or liabilities do not extend."

¹ Evans on Agency, 217; Maltby v. Christie, 1 Esp. 340.

² Harington v. Hoggart, 1 Barn. & Ald. 577.

³ Evans on Agency, 218; Wilkinson v. Campbell, 1 Bay, 169; Bush v. Cole, 23 N. Y. 261; 84 Am. Dec. 343; Steele v. Ellmaker, 11 Serg. & R. 86; Wolfe v. Luyster, 1 Hall, 161; Williams v. Poor, 3 Cranch C. C. 251; Townes v. Birchett, 12 Leigh, 173.

⁴ Broughton v. Silloway, 114 Mass. 71; 19 Am. Rep. 312.

⁵ Roberts v. Roberts, 13 Gratt. 639; 70 Am. Dec. 435.

⁶ Tripp v. Barton, 13 R. I. 130.

⁷ Bush v. Cole, 23 N. Y. 261; 84 Am. Dec. 343.

⁸ Robinson v. Rutter, 4 El. & B. 954; Beller v. Block, 19 Ark. 566; or

maintain replevin: Tyler v. Freeman, 3 Cush. 261; Hase v. Young, 16 Johns. 1; Minturn v. Main, 7 N. Y. 220; Bleecker v. Franklin, 2 E. D. Smith, 93; Beller v. Black, 19 Ark. 566; Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243; Bogart v. O'Regan, 1 E. D. Smith, 590. But see Grice v. Kenrick, L. R. 5 Q. B. 340; Dickenson v. Naul, 4 Barn. & Adol. 638. In Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353, it is said: "In case of personal property, an auctioneer employed to sell may ordinarily maintain an action for the price, or for the property itself: Chitty on Contracts, 10th Am. ed., 252; 1 Chitty on Pleadings, 6th ed., 7, 8; Story on Agency, secs. 27, 107, 397; Tyler v. Freeman, 3 Cush. 261. This doctrine stands upon the right of the auctioneer to receive, and his responsibility to his principal for the price of the property sold, and his lien thereon for his commissions, which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds. In case of real estate, he can have no such

name of his principal.¹ "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is no difference whether the sale be on the premises of the owner or at a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell."² So the principal may sue.³ An auctioneer can maintain a suit in his own name for goods sold and delivered by him, whereon he holds a lien for his charges.⁴ Being in possession of goods and chattels which he sells, he is authorized to receive payment.⁵ He has authority to prescribe the rules of bidding and terms of sale.⁶ Printed terms of sale cannot be varied by parol declarations of the auctioneer.⁷ But an advertisement of a sale of property by an auctioneer may be explained at the time of sale.⁸ Where is it provided by the terms of an auction sale that a proportion of the purchase-money shall be paid within a given time, and the auctioneer is authorized to receive it, his authority is not revoked immediately upon the expiration of the time limited, without further orders from his principal, prohibiting the subsequent reception of such money.⁹

ILLUSTRATIONS. -- A licensed auctioneer sells goods on credit. The buyer refuses to take them. The owner may bring an

special property, and would not ordinarily be held entitled to receive the price. But when the terms of his employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and we see no reason why he may not sue for it in his own name, whenever an action for the deposit,

separate from the other purchase-money, may become necessary."

¹ *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327.

² *Loughborough, C. J.*, in *Williams v. Millington*, 1 H. Black. 84.

³ *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327.

⁴ *Flanigan v. Crull*, 53 Ill. 352.

⁵ *Capel v. Thornton*, 3 Car. & P. 352; *Yourt v. Hopkins*, 24 Ill. 326.

⁶ *Story on Agency*, sec. 107; *Paley on Agency*, sec. 257; *Menson v. Aldridge*, 3 Esp. 271.

⁷ *Wright v. Deklyne*, Pet. C. C. 199.

⁸ *Rankin v. Matthews*, 7 Ired. 286.

⁹ *Pinckney v. Hagadorn*, 1 Duer, 89.

action for damages in his own name before the expiration of the credit. But he cannot sue for the price until the credit expires: *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327.

§ 216. Auctioneer as Agent of Both — Statute of Frauds.—An auctioneer is primarily the agent for the seller, but he is, for certain purposes, the agent of the buyer also.¹ He may bind both seller and purchaser by his memorandum of sale and purchase,² and his writing the name of the purchaser on the memorandum immediately on his knocking the thing down is a sufficient signing within the statute of frauds, as to both real and personal property,³ auction sales being within the statute of frauds.⁴ "He is the agent of the vendor by virtue of his employ-

¹ Story on Agency, sec. 27. In *Williams v. Millington*, 1 H. Black. 85, Heath, J., said: "Though he is an agent to some purposes, he is not so to all. He is an agent for each party in different things, but not in the same thing. When he prescribes the rules of bidding, and the terms of the sale, he is the agent of the seller. But when he puts down the name of the buyer, he is agent for him only."

² Story on Agency, secs. 27, 107; *Smith v. Jones*, 7 Leigh, 165; 30 Am. Dec. 498.

³ *Cleaves v. Foss*, 4 Me. 1; *McComb v. Wright*, 4 Johns. Ch. 659; *Alna v. Plummer*, 4 Me. 258; *Jenkins v. Hogg*, 2 Tread. Const. 821; *Pike v. Balch*, 38 Me. 302; 61 Am. Dec. 248; *Smith v. Arnold*, 5 Mason, 414; *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243; *Pugh v. Chesseldine*, 11 Ohio, 109; 37 Am. Dec. 414; *Hart v. Woods*, 7 Blackf. 568; *Burke v. Haley*, 7 Ill. 614; *White v. Crow*, 16 Ga. 416; *Adams v. McMillan*, 7 Port. 73; *Gill v. Hewitt*, 7 Bush, 10; *Walker v. Ilerrig*, 21 Gratt. 678; 8 Am. Rep. 616; *Singstack v. Harding*, 4 Har. & J. 156; 7 Am. Dec. 669; *Davis v. Robertson*, 1 Mill Const. 71; 12 Am. Dec. 611; *Episcopal Church v. Wiley*, 2 Hill Ch. 584; 30 Am. Dec. 386; *Doty v. Wilder*, 15 Ill. 410; 60 Am. Dec. 756; *Smith v. Jones*, 7 Leigh, 165; 30 Am. Dec. 498; *Craig*

v. Godfroy, 1 Cal. 415; 54 Am. Dec. 299; *Lake v. Campbell*, 18 Ill. 109; *Lewis v. Wells*, 50 Ala. 198; *Blackwood v. Leman*, Harp. 219; *Arden v. Brown*, 4 Cranch C. C. 121; *Thomas v. Kerr*, 3 Bush, 619; 96 Am. Dec. 262. In *Morton v. Dean*, 13 Met. 388, it is said: "A sale by auction is within the statute of frauds, and the auctioneer who makes the sale is the agent of both parties, and his memorandum will take the case out of the statute as well when lands as when chattels are sold. But the memorandum of sale must refer to the conditions of sale, or the case will be within the statute. Where the connection between the memorandum and the conditions is to be proved entirely by parol evidence, it is within the mischief intended to be prevented by the statute. The terms of the agreement which are material must be stated in writing."

⁴ *Arden v. Brown*, 4 Cranch C. C. 121; *Talman v. Franklin*, 3 Duer, 395; *Burke v. Haley*, 7 Ill. 614; *Pike v. Balch*, 38 Me. 302; 61 Am. Dec. 248; *O'Donnell v. Leeman*, 43 Me. 158; 69 Am. Dec. 54; *Brent v. Green*, 6 Leigh, 16; *Davis v. Rowell*, 2 Pick. 64; 13 Am. Dec. 398; *Morton v. Dean*, 13 Met. 388; *People v. White*, 6 Cal. 75; *Davis v. Robertson*, *supra*; *Bailey v. Ogdon*, 3 Johns. 399; 3 Am. Dec. 509; *Meadows v. Meadows*, 3 McCord, 458; 15 Am. Dec. 645.

ment to make the sale, and he is made the agent of the vendee by the act of the latter in giving him his bid, and receiving from him, without objection, the announcement that the property sold is knocked off to him as purchaser."¹ The true reason probably is, it is said,² "that a sale by auction, being open and visible, and in the presence of witnesses, either competitors or persons present, and closely watching the proceeding, there is less danger of fraud or perjury in proving the making and terms of the contract, and so the main reason for requiring a memorandum in writing does not exist. The technical ground is, that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as a bidder, and thus confers an authority on the auctioneer or clerk to sign his name, and this is the whole extent of the authority." The memorandum, however, must refer to the conditions of sale;³ it must be in writing,⁴ and contain the names of the parties, the property sold, and the price,⁵ but not necessarily the terms of payment.⁶ It is sufficient if made by the auctioneer's clerk;⁷ but neither of the contracting parties can be agent of the other to make the memorandum;⁸ nor is it good if the auctioneer is himself

¹ *Bent v. Cobb*, 9 Gray, 397; 69 Am. Dec. 295.

² *Gill v. Bicknell*, 2 Cush. 358.

³ *Morton v. Dean*, 13 Met. 385; *Price v. Durin*, 56 Barb. 647; *Gowen v. Klous*, 101 Mass. 449; *Adams v. Seales*, 1 Baxt. 337; 25 Am. Rep. 775. *Baltzen v. Nicolay*, 53 N. Y. 470; *Gill v. Bicknell*, 2 Cush. 358.

⁴ *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243; *Potter v. Duffield*, L. R. 18 Eq. 47; *Norris v. Blair*, 39 Ind. 90; 10 Am. Rep. 135; *Meadows v. Meadows*, 3 McCord, 458; 15 Am. Dec. 645; *Doty v. Wilder*, 15 Ill. 407; 60 Am. Dec. 756; *Ridgway v. Ingram*, 50 Ind. 145; 19 Am. Rep. 706; *Gwathney v. Cason*, 74 N. C. 5; 21 Am. Rep. 484.

⁵ *Smith v. Jones*, 7 Leigh, 165; 30 Am. Dec. 498.

⁷ *Jenkins v. Hogg*, 2 Tread. Const. 821; *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243; *Harvey v. Stevens*, 43 Vt. 653; *Alna v. Plummer*, 4 Me. 258; *Pope v. Chafec*, 14 Rich. Eq. 69; *Baptist Church v. Bigelow*, 16 Wend. 28; *Norris v. Blair*, 39 Ind. 90; 10 Am. Rep. 135; *Cathcart v. Keirnaghan*, 5 Strob. 129; *contra*, *Meadows v. Meadows*, *supra*.

⁸ *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243; *Wright v. Dannah*, 2 Camp. 205; *Thomas v. Trustees*, 3 A. K. Marsh. 298; 13 Am. Dec. 165; *Rayner v. Linthorn*, 2 Car. & P. 124; *Sherman v. Brandt*, L. R. 6 Q. B. 720. "The chief reason," it is

the vendor,¹ or it is a private and not a public sale;² nor is it sufficient if the owner is present directing the sale, and the auctioneer simply cries the bids and knocks off the property;³ nor is it sufficient if the sale has really been made before the auction,⁴ or if the memorandum was made after the sale was adjourned.⁵ Only the parties can take advantage of the defects in the memorandum.⁶ A trustee who, at an auction sale under a deed of trust, acts as his own auctioneer, cannot bind his purchaser by a memorandum of the sale made by himself, because such memorandum is not executed by the "party to be charged therewith, or some other person by him thereto lawfully authorized," as required by the Missouri statute of frauds.⁷ A parol agreement of the purchaser at a public sale, that another shall be regarded as a joint purchaser, is void, under the statute of frauds.⁸ A general memorandum entered in a book by the auctioneer at the commence-

said in *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295, "in support of the rule that an auctioneer acting solely as such may be the agent of both parties to bind them by his memorandum is, that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract and the party in interest also."

¹ As, for instance, a guardian selling by auction land of his ward: *Bent v. Cobb*, 9 Gray, 397; 69 Am. Dec. 295; *Tull v. David*, 45 Mo. 444; 100 Am. Dec. 385; *Adams v. Scales*, 1 Baxt. 337; 25 Am. Rep. 775.

² *Mews v. Carr*, 1 Hurl. & N. 484.

³ *Adams v. Scales*, 1 Baxt. 337; 25 Am. Rep. 775.

⁴ *Wharton on Agency*, sec. 656, citing *Bartlett v. Purnell*, 4 Ad. & E. 792.

⁵ *Wharton on Agency*, sec. 656, citing *Horton v. McCarty*, 53 Me. 394; *Mews v. Carr*, 1 Hurl. & N. 484; *McComb v. Wright*, 4 Johns. Ch. 659; *Gill v. Bicknell*, 2 Cush. 355; *Walker v. Herring*, 21 Gratt. 678; 8 Am. Rep. 616 (*Craig v. Godfrey*, 1 Cal. 415; 54 Am.

Dec. 299, even on the same day); *Hicks v. Whitmore*, 12 Wend. 548; *Smith v. Arnold*, 5 Mason, 414; *Gwathney v. Cason*, 74 N. C. 5; 21 Am. Rep. 484. A memorandum made in pencil at the time of the sale, and entered upon the books as soon as practicable, is sufficient: *Episcopal Church v. Wiley*, 1 Riley Ch. 156; 2 Hill Ch. 583; 30 Am. Dec. 386. In *Horton v. McCarty*, *supra*, it is said: "The law, in allowing the auctioneer to act in the nearly unprecedented relation of agent of both parties, imposes a qualification not applied to the usual cases of agency, and requires that the single act which almost from necessity he is authorized to perform for the buyer shall be done at the time of sale, and before the termination of the proceedings." In *Gill v. Bicknell*, 2 Cush. 355, Shaw, C. J., said: "The name of the bidder must be entered by the auctioneer or by his clerk, under his direction, on the spot."

⁶ *Lewis v. Wells*, 50 Ala. 198.

⁷ *Tull v. David*, 45 Mo. 444; 100 Am.

Dec. 385.

⁸ *Arden v. Brown*, 4 Cranch C. C. 121.

ment of an auction sale, showing the name of the person on whose account the sale is made, the nature of the property, the terms of payment, referring to entries following for the names of purchasers and lots struck off to each, and signed by the auctioneer, under which he enters the name of each purchaser, the description of the goods sold, and the price, is a sufficient memorandum of each sale within the statute of frauds. It is not necessary that such general memorandum should be made as often as a parcel of goods is sold; even though the sale is adjourned to and continues on the second day without any repetition of the memorandum.¹

ILLUSTRATIONS. — At a public sale of town lots a lot was struck off to a person for a certain sum, and a memorandum of the purchase was made at the time, by the clerk of the sale, in the sale-book. *Held*, that the sale was valid under the statute of frauds: *Hart v. Woods*, 7 Blackf. 568. At a sale at auction of a house and blacksmith's shop, with a leasehold interest in the lot on which they stood, the auctioneer wrote with a pencil, on the back of the lease, "\$200. . . . \$350. . . . Richard Burke." *Held*, that this was not sufficient to bind the purchaser, *Burke v. Haley*, 7 Ill. 614. At an auction sale of real estate the property was knocked down to C. No memorandum was signed, but the auctioneer went into his office, two hundred yards from the sale, and in C.'s absence began to draw a deed, before he had finished which he was informed that C. refused to complete the purchase. *Held*, that the sale was invalid under the statute of frauds: *Gwathney v. Cason*, 74 N. C. 5; 21 Am. Rep. 484. W. and H. agreed to purchase property jointly at auction. In pursuance thereof W. bid on the property, and W.'s name was written in the auctioneer's book as purchaser. The next day a partner of W. added H.'s name as purchaser. A loss having occurred by a resale in an action by W. against H. to recover his share of the loss, *held*, that the memorandum did not take the case out of the statute of frauds, and that H. was not liable: *Walker v. Herring*, 21 Gratt. 678; 8 Am. Rep. 616. The terms of sale at a public auction were a credit of nine months on notes with approved security, waiving valuation and appraisement laws. The auctioneer's memorandum did not state these terms. *Held*, that the sale was void under the statute of frauds: *Norris v. Blair*, 39 Ind. 90; 10 Am. Rep. 135.

¹ *Price v. Durin*, 56 Barb. 647.

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A trustee offered lands at auction, being present and directing the sale, but employing a crier to receive and announce the bids and knock down the property. The trustee made a memorandum of the sale to S. *Held*, that this was not sufficient to bind S. within the statute of frauds: *Adams v. Scales*, 1 Baxt. 337; 25 Am. Rep. 772. In an auctioneer's book was the following entry: "The tract of land to William Meadows, Jr., at five dollars and forty-eight cents." *Held*, an insufficient memorandum within the statute of frauds: *Meadows v. Meadows*, 3 McCord, 458; 15 Am. Dec. 645. A memorandum of sale made by the clerk of an auctioneer in his book was as follows: "Fox tract of land, four dollars and ten cents per acre; purchaser, W. Smith." *Held*, sufficient within the statute of frauds: *Smith v. Jones*, 7 Leigh, 165; 30 Am. Dec. 498. An auctioneer, on selling real estate to S. D. at auction, after reading or exhibiting written conditions of sale, made this memorandum in writing: "Sale on account of Messrs. Morton and Dean, assignees of the Taunton Iron Company, of the real estate, nail-works, water privilege, buildings, and machinery, agreeable to the plans and schedule herewith. Saie to Silas Dean for \$30,300. April 5, 1843," *Held*, that as this memorandum did not contain nor refer to the conditions of sale, it did not take the case out of the statute of frauds: *Morton v. Dean*, 13 Met. 385. In *assumpsit* against M. for \$112.50, the price of a pew, the plaintiff proved the following entry in the auctioneer's book of sales: "Sale of pew in B. church for account, S. F. [the plaintiff], Monday, March 24, 1845. Pew No. 18, B. M., \$112.50. Charges, advertising, and commission, \$5." *Held*, a sufficient memorandum within the statute, if made at the time and place of sale by the auctioneer or under his direction; the omission of the middle letter of defendant's name not being fatal, if it could be shown by parol that he was the person intended, or that he was known by one name as well as the other: *Fessenden v. Mussey*, 11 Cush. 127. A memorandum in writing of an auction sale of land signed by the auctioneer, authorized by the vendor to conduct the sale, contained a description of the premises sold, the names of both parties to the agreement, the price agreed upon, an acknowledgment of the receipt of a sum of money in part payment, and a clause in which the auctioneer agreed that "the vendor shall in all respects fulfill the conditions of sale," but did not set forth what were these "conditions of sale." *Held*, that this was not a sufficient memorandum within the statute of frauds: *Riley v. Farnsworth*, 116 Mass. 223. The auctioneer's clerk made a memorandum as follows: "Rayner tract to James S. Long, at forty dollars per acre," by order of the auctioneer, and it was shown that "Rayner tract"

was a well-known designation. *Held*, that under the circumstances, the memorandum was sufficient within the statute of frauds: *Cherry v. Long*, Phill. (N. C.) 466. G., the auctioneer at an auction sale of the property of H., caused to be entered by his clerk, as the sales were made, the articles sold, the names of the buyers, and the prices at which the articles were sold, in a book headed, on the inside of the front cover, "John Harvey's auction sale book." *Held*, that this memorandum was sufficient to satisfy the requirements of the statute of frauds, and therefore bound the parties upon a contract of sale made by the auctioneer: *Harvey v. Stevens*, 43 Vt. 653.

§ 217. **Powers not Possessed by Auctioneer.** — An auctioneer has no authority to purchase (he is to sell, not to buy);¹ nor to sell in private;² nor to give a warranty as to the goods sold;³ nor to sell on credit;⁴ nor to bind his principal by verbal declarations at the sale inconsistent with the printed or published particulars of the sale;⁵ nor to delegate his authority by employing another person to sell the property intrusted to him to sell;⁶ nor to receive

¹ Story on Agency, sec. 27; *Brock v. Rice*, 27 Gratt. 812.

² *Wilkes v. Ellis*, 2 H. Black. 555; *Daniel v. Adams*, Amb. 495; *Jones v. Nanney*, 13 Price, 76; *Marsh v. Jelf*, 3 Fost. & F. 234.

³ "Sales at auction in the usual mode are never understood to be accompanied by a warranty. Auctioneers are special agents, and have only authority to sell, and not to warrant, unless specially instructed so to do": *The Monte Allegre*, 9 Wheat. 645. "We doubt whether, in an ordinary sale of goods by auction, an auctioneer *virtute officii* has any right or authority to warrant goods sold by him in the absence of any express authority from his principal to do so, and without proof of some known and established usage of trade from which an authority can be implied. . . . However this may be, we are clear that he has no such authority in a case like this where he acts as agent for an administrator in selling the goods of his intestate": *Blood v. French*, 9 Gray, 197.

⁴ Story on Agency, sec. 107; *Williams v. Evans*, L. R. 1 Q. B. 352. Nor to receive a check where the terms

were cash: *Broughton v. Silloway*, 114 Mass. 71; 19 Am. Rep. 312; *Bridges v. Garrett*, L. R. 4 Com. P. 580; *Townes v. Birchett*, 12 Leigh, 173. But see *Pinckney v. Hagadorn*, 1 Duer, 90.

⁵ Story on Agency, sec. 107; *Gunnis v. Erhart*, 1 H. Black. 289; *Wright v. Deklyne*, Pet. C. C. 199; *Poree v. Bonneval*, 6 La. Ann. 386; *Layton v. Hennen*, 3 La. Ann. 1. But see *Ran-kin v. Matthews*, 7 Ired. 286; *Satterfield v. Smith*, 11 Ired. 60. If the purchaser gets substantially what he bargained for, he may generally be held to abide by the purchase, with the allowance of some deduction from the price by way of compensation for any small deficiency in the value by reason of the variation between the description and the article sold: *Whar-ton on Agency*, sec. 646, citing 2 Kent's Com. 537.

⁶ *Coles v. Trecothick*, 9 Ves. 234; *Blore v. Sutton*, 3 Mer. 237; *Stone v. State*, 12 Mo. 400; *Poree v. Bonneval*, 6 La. Ann. 386. In *Commonwealth v. Harnden*, 19 Pick. 482, the court say: "Special trust and confidence is placed in an auctioneer which he cannot delegate. Yet this does not require that

the purchase price of real property sold by him.¹ His authority ceases when the sale is made, and he has no power therefore to subsequently deal with the purchaser as to terms,² or to rescind the contract.³ He cannot act for himself or any other person as a purchaser.⁴

he should make all the sales in person. He may employ all necessary and proper clerks and servants. And in the course of a protracted sale, he may undoubtedly, without a violation of law, relieve himself by employing others to use the hammer and make the outcry. But this should be done under his immediate direction and supervision. We do not mean, however, by this that he must be actually present during the whole time of the sale. An occasional absence would not subject his servant or substitute to the penalties of the statute. If the auctioneer really conducted the auction and made the sales, he might, within his authority, call to his aid such assistance as might be needed to transact the business in a convenient and proper manner; but he clearly could not appoint deputies to make sales at different places and times in his absence. This would be inconsistent with his duty to manage his auctions fairly, and to render under oath a true account of his sales. It would, too, enable him to employ those to carry on the business who might not be deemed, by the proper authorities, suitable persons to be trusted with the power."

¹ *Sykes v. Giles*, 5 Mees. & W. 645. It seems he may receive the deposit required, but not the whole purchase price: *Myers v. Joliffe*, 1 Moody & R. 326.

² *Seton v. Slade*, 7 Ves. 276; *Pinckney v. Higginson*, 1 Duer, 89; *Boineist v. Leigheuz*, 2 Rich. 464; *Nelson v. Albridge*, 2 Stark. 435.

³ *Nelson v. Aldridge*, 2 Stark. 435; *Boineist v. Leigheuz*, 2 Rich. 464.

⁴ *Brock v. Rice*, 27 Gratt. 812; *Tate v. Williamson*, L. R. 2 Ch. 55. In *Vezio v. Williams*, 8 How. 134, it is said: "It is very questionable whether in point of law or equity an

auctioneer can be allowed to bid off for himself the very property he is selling. It has been laid down that he cannot: *Hughes's Case*, 6 Ves. 617; *Oliver et al. v. Court et al.*, 8 Price, 126; 9 Ves. 234; 8 Ves. 337; *Long on Sales*, 228; *Babington on Auctions*, 164. The principles against it are stronger, if possible, and certainly were enforced earlier in courts of equity than of law. An opposite course would give to an auctioneer many undue advantages. It would tend, also, to weaken his fidelity in the execution of his duties for the owner. He would be allowed to act in double and inconsistent capacities, as agent for the seller and as buyer also; and the precedents are numerous holding such sales voidable, if not void, and at all events unlawful, as opposed to the soundest public policy: See *Michoud v. Girod*, 4 How. 554; 15 Pick. 30; 1 Mason, 344; 2 Johns. Ch. 51; *Tufts v. Tufts*, Mass. Dist., 1848, and cases there cited; *Long on Sales*, 228; 9 Paige, 663; 1 Story's Eq. Jur., sec. 315; 3 Story, 625. That an auctioneer is a general agent for the owner usually, though questioned in the argument, cannot be doubtful: See *Howard v. Braithwaite*, 1 Ves. & B. 509; *Story on Agency*, secs. 27, 28; 4 Burr. 1921; 1 H. Black. 85. He is so till the sale is completed: *Long on Sales*, 231; *Seton v. Slade*, 7 Ves. 276; *Babington on Auctions*, 99; 20 Wend. 43. And though he may be agent of the buyer after the sale for some purposes, such as to take the case out of the statute of frauds: *Williams v. Millington*, 1 H. Black. 84; 3 Term Rep. 148; *Cowp.* 395; *Long on Sales*, 60, 63, 228; *Emerson v. Heelis*, 2 Taunt. 38; 1 Esp. 101; yet this does not affect the other principle, that till the sale, and before it, he acts for the vendor alone."

§ 218. **Liabilities of Auctioneers.**—The auctioneer is personally liable if he does not disclose the name of his principal at or before the sale.¹ Where the name of the owner of the chattel sold is not disclosed, and it is afterwards claimed by a superior title, the purchaser may, in an action for money had and received, recover the purchase-money of the auctioneer.² An auctioneer is liable for the state's charges, whether he collects them from the vendor or not. The law makes no exception in cases of succession, bankruptcy, and judicial sales. The charges are due, however, only upon actual complete sales.³ An auctioneer selling realty for a less sum than he is authorized to do, and at such sale signing the contract as agent of an undisclosed principal, does not thereby bind the owner of the property, but becomes personally liable under the contract to refund to the purchaser the amount of any deposit he may make and auctioneers' fees, with interest; and if he knew that he was not authorized so to sell, will also be held liable for what the premises were worth over and above the price he was to pay therefor.⁴ An auctioneer who innocently sells stolen goods is liable to the true owner, even where the proceeds have been paid over to the thief without notice of the felony.⁵ An auctioneer who sells goods which are claimed by a third person is liable to him if he pay over the proceeds after notice.⁶ If the purchaser of land at auction deposits with the auctioneer a sum of money, in compliance with the terms of sale, and the sale is afterwards abandoned by

¹ *Mills v. Hunt*, 17 Wend. 333; 20 Wend. 431; *Hanson v. Roberdeau*, Peake, 120; *Franklyn v. Lamond*, 4 Com. B. 637; *Schell v. Stephens*, 50 Mo. 375. The bidder may repudiate his bid if the auctioneer refuses to disclose the principal: *Thomas v. Kerr*, 3 Bush, 619; 96 Am. Dec. 262.

² *Seemuller v. Fuchs*, 64 Md. 217; 54 Am. Rep. 766.

³ *State v. Girardey*, 34 La. Ann. 620.

⁴ *Bush v. Cole*, 28 N. Y. 261; 84 Am. Dec. 343.

⁵ *Hoffman v. Carow*, 20 Wend. 21; 22 Wend. 285; *Chambess v. McCormick*, 4 N. Y. Leg. Obs. 342; *Allen v. Brown*, 5 Mo. 323; *Dent v. McGrath*, 3 Bush, 174; *Rogers v. Huie*, 1 Cal. 429; 54 Am. Dec. 300; *contra*, *Jacobs's Case*, 2 Bay, 84; *Rogers v. Huie*, 2 Cal. 571; 56 Am. Dec. 363.

⁶ *Hardacre v. Stewart*, 5 Esp. 103; *Jacobs's Case*, 2 Bay, 84.

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mutual consent of the parties, and the purchaser there-
upon forbids the auctioneer to pay over the money to the
vendor, and thus prevents him from doing so, the latter
is not responsible to the purchaser for its return.¹ But
if the sale is not completed, through the fault of the ven-
dor, the latter is responsible to the purchaser for the
return of the money, although he has never personally
received the same.² In an action against an auctioneer
to recover the price of property sold by the auctioneer,
the plaintiff must prove such a property in the articles
sold as will entitle him to the proceeds of sale. It is not
sufficient to show merely that he delivered them to the
auctioneer.³ An auctioneer who sells the property of an
estate under an order of court, and receives the price
therefor, is not a depositary for the purchaser. He can-
not, therefore, be held liable to the purchaser for the re-
turn of the purchase-money, in case the latter fails to
receive the goods purchased, unless it is shown that the
purchase-money is still in the hands of the auctioneer,
and is not claimed by any one else.⁴ The mere fact that
auctioneers acted as such in making the sale is not of
itself notice that they were not selling their own goods.
They must be deemed vendors, and responsible as such
for the title of the goods sold, unless they disclose at the
time of the sale the name of the principal. And the joint
signature of the bill of sale by the auctioneer with the
principal will raise a presumption that the auctioneer
acted also as principal, which cannot be contradicted by
parol evidence that he did not sell or intend to hold him-
self responsible as principal.⁵

As to sales made without reserve, an auctioneer who ad-
vertises to sell "without reserve," but who knocks the
goods down to an illusory bidder, is liable to an action at

¹ Robinson v. Trofitter, 11 Allen, 339.

² Teaffe v. Simmons, 11 Allen, 342.

³ Allen v. Brown, 5 Mo. 323.

⁴ Lara v. Nash, 24 La. Ann. 310.

⁵ Schell v. Stephens, 50 Mo. 375.

the suit of the highest *bona fide* bidder.¹ The last *bona fide* bidder at an auction, which is advertised as a peremptory sale, has no remedy against the auctioneer for knocking the property down to a subsequent bid by the vendor's agent.² An action does not lie against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named.³ A sheriff, selling property at auction, is not obliged to attend to the bid of an insufficient purchaser.⁴ An auctioneer by advertising that the sale of certain goods would take place on a certain day does not so bind himself to sell them then as to make himself liable to persons who went to expense in order to attend the sale.⁵ A statement by an auctioneer, made as an inducement to purchase, that a building is suited for tenement purposes, and could be removed for that purpose, but not shown to be made or understood to vary the terms of a printed advertisement, is a statement of opinion only, and cannot be construed as an implied guaranty that the proper authorities would grant a permit to remove the

¹ Warlow v. Harrison, 1 El. & E. 309. In this case Martin, B., said: "In a sale by auction there are three parties; namely, the owner of the property to be sold, the auctioneer, and the portion of the public who intend to bid, which includes, of course, the highest bidder. In this, as in most cases of auction, the owner's name was not disclosed; he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be 'without reserve.' This, according to all the cases, both in law and in equity, means that neither the vendor nor any person in his behalf may bid at the auction, and that the property be sold to the highest bidder, whether the sum be equivalent to the real value or not. . . . Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think

that the auctioneer who puts up property for sale upon such a condition pledges himself that the sale shall be without reserve, or in other words, contracts that it shall be so, and that this contract is made with the highest *bona fide* bidder; and in case of a breach of it, he has a right of action against the auctioneer. . . . We entertain no doubt that the owner may at any time before the contract is legally complete interfere and revoke the auctioneer's authority; but he does so at his own peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

² Mainprice v. Westley, 6 Best & S. 420; 13 L. T., N. S., 560; 34 L. J. Q. B. 229; 14 Week. Rep. 9.

³ Bexwell v. Christie, Cowp. 395.

⁴ Den v. Zellers, 7 N. J. L. 153.

⁵ Harris v. Nickerson, L. R. 8 Q. B. 286.

building through the public streets.¹ An auctioneer employed under an agreement that he shall be paid expenses of printing advertisements of the sale cannot charge for ordinary rates if the printer has allowed him any discount therefrom. Whether he were allowed the discount under an arrangement with the printer embracing all his advertising, or only under a special agreement for the advertisement of his employer, the discount would be no part of the expense of advertising. And, independently of the special authority, the agent would be bound to procure advertising on the best terms he could for his principal.²

ILLUSTRATIONS. — The persons present at an auction sale, being distrustful of the title of W., the reputed owner of the article to be sold, the auctioneer announced that he "knew W. well, and he was all right, and he, C., the auctioneer, would warrant that his title was good." *Held*, that this amounted to a warranty: *Dent v. McGrath*, 3 Bush, 174. An auctioneer accepted a bid for a horse, but did not call for the name of the buyer. The buyer was asked by the auctioneer to come to the desk, but did not do so. Later the auctioneer put up the horse again, and sold him for a less sum. *Held*, that the auctioneer was liable to the owner for the sum first bid: *Townsend v. Van Tassel*, 8 Daly, 261.

§ 219. **Liabilities and Rights of Bidders.** — One who bids for another at an auction, without disclosing his agency, will be personally liable as purchaser;³ so of one who stands by and allows his name to be put down as purchaser, though he did not bid.⁴ A bidder of a "choice" from a lot must make his election at once.⁵ Where the purchaser at a public sale fails to comply with the conditions, and the property is resold, he can be held liable for a deficiency only when the conditions of the second sale are the same, or are not more onerous than

¹ *Woodward v. Boston*, 115 Mass. 81.

⁴ *Jenkins v. Hogg*, 2 Tread. Const.

² *Union Refining etc. Co. v. Pente-*

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cost, 79 Pa. St. 491.

³ *McComb v. Wright*, 4 Johns. Ch. 377; 37 Am. Dec. 511.

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those of the first sale.¹ Where A offers property for sale at public auction, and the property is knocked off to B, the contract is binding upon A, although he before told B that his bid should not be received, unless he directed the auctioneer not to receive the bid of B.² One who sells chattels at auction on credit, to a purchaser who fails to comply with the terms of the sale within the time for which the credit was given, may, after the expiration of that time, sue for the price without a delivery of or an offer to deliver such chattels to the purchaser.³ A mistake by the auctioneer in entering the vendor's name will be corrected in equity.⁴ By being knocked down to a bidder, the property does not vest if a higher bid was made and recognized, and the sale was reopened.⁵ The auctioneer should reopen the sale where it is affirmed, and he has good reason to believe, that there was a higher bid made.⁶ The bidder to whom land is knocked down is not bound to pay the purchase-money and accept the deed tendered, and leave the seller to clear up defects in the title afterwards with the aid of the purchase-money.⁷ Where a tract of land divided into city lots is put up and sold at auction in separate and independent parcels, a defect in the title to one parcel, or to a lot included therein, will not avoid or affect the sale of another parcel; but a defect in the title to any one of several lots put up and sold as one parcel avoids the sale of the whole parcel.⁸

A bidder may repudiate a purchase of goods knocked down to him, if the auctioneer refuses to disclose the owner.⁹ An agent for complainants in a foreclosure suit may bid upon the property for his principals without giving notice to other bidders that he is not bidding for

¹ *Weast v. Derrick*, 100 Pa. St. 509.

² *Ricks v. Battle*, 7 Ired. 269.

³ *Wade v. Moffett*, 21 Ill. 110; 74 Am. Dec. 79.

⁴ *Pugh v. Chesseldine*, 11 Ohio, 109; 37 Am. Dec. 414.

⁵ *Pike v. Balch*, 38 Me. 302; 61 Am. Dec. 248.

⁶ *Pike v. Balch*, *supra*.

⁷ *Gormley v. Kyle*, 137 Mass. 189.

⁸ *Mott v. Mott*, 68 N. Y. 246.

⁹ *Thomas v. Kerr*, 3 Bush, 619; 96 Am. Dec. 262.

himself, but for the complainants. But if such agent bids off the property, without disclosing his principal, in his own name, he will be responsible for the completion of the purchase.¹ If the terms of sale of land are, that the buyer shall, within thirty days, give his notes, with good indorsers, and if he shall fail so to do, then the land to be resold on his account, the vendor cannot maintain an action for breach of the contract until the deficit is ascertained by a resale.² When an auctioneer sells a balance of goods without specifying their quantity, he has a reasonable time to ascertain it; when this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase-money, or a portion of it, the contract becomes executed, and the auctioneer will not afterwards be permitted to allege a mistake as to the quantity.³ It is illegal to concert with an auctioneer a private signal denoting a bid at a sale of property by public auction. Such a contrivance gives an advantage to one person over the other fair and open bidders at the sale.⁴

ILLUSTRATIONS. — At a mortgage sale the auctioneer offered the property free of encumbrances, and the defendant purchased with that understanding, at the full value of the property. *Held*, that the defendant could not be compelled to accept the title when the property was encumbered with prior mortgages: *Mayer v. Adrian*, 77 N. C. 83. Plaintiff bid off a carriage at auction sale, for which secured notes were to be given, which he did not give, but left the carriage with the understanding that it was not to be taken away until paid for, and did not call for it for four months. *Held*, that he had no title to it: *Matthews v. McElroy*, 79 Mo. 202. In an action by an auctioneer to recover the price of an article under the value of ten pounds, which was described in the written catalogue of sale as being of silver, *held*, that evidence was receivable to show that before the article was put up for sale, the auctioneer, without making any alteration in the catalogue, stated publicly from his box, in the hearing of the defendant, that the catalogue was

¹ National Fire Ins. Co. v. Loomis, 11 Paige, 431.

² Webster v. Hoban, 7 Cranch, 399. 173.

³ Burgoyne v. Middleton, 4 Cal. 64.

⁴ Conover v. Walling, 15 N. J. Eq.

incorrect, and that the article would only be sold as plated, subsequently to which the defendant bid for it: *Eden v. Lake*, 13 Mees. & W. 614; 9 Jur. 213; 14 L. J. Ex. 194. A put goods up at auction, one of the conditions of the sale being that the goods should be taken away at the buyer's expense within fourteen days, in default of which the deposit to be forfeited, the goods to be resold, and the loss to be made good by the purchaser at the auction. B bought the goods, and a bought-note was then entered into with this clause, "fourteen days for receiving and delivery." Held, that the meaning of the two contracts (the conditions of sale and the bought-note) was, that the fourteen days should be allowed to the purchaser only; and that the vendor should have been always ready to deliver them on request: *Hagedon v. Laing*, 1 Marsh. 514; 6 Taunt. 162. Land was sold under a power in a mortgage for a sum more than sufficient to pay the mortgage debt, and the mortgagee refused to execute a deed to the purchaser, on the ground that the purchaser had not paid down fifty dollars in cash as required by the terms of sale. It appeared that the purchaser, when he bid off the estate, did not have the sum, but that the auctioneer agreed to advance it, and told the mortgagee that the purchaser had paid it, and that the money was ready for him. Held, that this being so, and the auctioneer being ready to pay, the effect was the same as if the sum had been paid in fact by the purchaser to the auctioneer: *Muhlig v. Fiske*, 131 Mass. 110. A offered at public outcry to rent a tract of land in separate parcels, and B bid off two fields which the crier represented as containing seventy acres, but which probably contained much less. After the biddings were over, A and B made a contract for the rent of the whole tract, and B gave to A his note for the sum agreed on. Held, that this was a new and independent contract, unaffected by the representations of the crier: *Davis v. Winsmith*, 5 S. C. 332. By the terms of an auction sale of coal, the coal was to be taken away by the purchaser in October; and if he failed to do so, defendants had the option to discontinue further delivery, and to retain the earnest-money, or to resell on account of the purchaser. Plaintiff did not demand the coal until February, when defendant's stock of coal was exhausted and they refused to deliver, and plaintiff sued to recover therefor. Held, that the stipulation as to time was to be deemed of the essence of the contract, and a condition precedent, which must be observed by plaintiff to enable him to enforce it; and that defendants were not limited to the remedies prescribed, but had the right to hold themselves absolved from the contract upon the failure of plaintiff to perform: *Higgins v. Delaware etc. R. R. Co.*, 60 N. Y. 553.

A map prepared by defendant, and produced at an auction sale of lots in New York City, of which he was the owner, represented a strip of land at One Hundred and Thirty-fifth Street, and the auctioneer sold lots as laid out on the strip, and a boulevard shown by the map which crossed it, stating that they were corner lots. *Held*,—1. That plaintiff, who purchased the lots at the sale, and who before bidding had seen the map, was entitled to all which he might properly have understood from the map and auctioneer's language; viz., to a conveyance describing the lots as being bounded by One Hundred and Thirty-fifth Street; 2. That a conveyance stating that they were bounded by "the line of a certain strip of land designated and laid out as One Hundred and Thirty-fifth Street on the map or plan of the city of New York," was not in compliance with the contract of sale; 3. That evidence offered by defendant in an action for specific performance to prove what he intended to sell was properly rejected: *Phillips v. Higgins*, 7 Lans. 314. A house fitted only with cold water was advertised in the newspapers to be sold by auction as fitted with "hot and cold water," and subject to examination at any time before the sale, the keys, terms, and further particulars to be obtained on application to the auctioneer. At the auction the auctioneer read from a paper the terms of sale; announced that there was an error in the advertisement, as the house was not fitted with hot water; and then offered the house for bids, when it was bid in by a person who, having read the advertisement in the newspapers, but not examined the house, nor applied to the auctioneer, had come to the sale, but arrived after the announcement. The auctioneer then presented to the buyer the paper from which the terms of sale had been read, and the buyer signed it without fully reading it. At the top of this paper was posted a copy of the advertisement cut out of a newspaper, from which the words "hot and" were erased, but the buyer did not notice the erasure. By the same paper the buyer agreed to comply with the conditions of sale, and to deposit two hundred dollars, to be forfeited to the vendor if he should fail so to comply. After signing the paper he examined the house, and finding that it was not fitted with hot water, refused to take it, or to pay the two hundred dollars, whereupon the auctioneer advertised the house for sale "on the account of" said buyer, and sold it for thirty dollars more than the amount of his bid. *Held*, that in the absence of fraud the first buyer was bound by his contract. *Held*, also, that the auctioneer might maintain in his own name an action for the two hundred dollars without regard to the extent of his lien thereon, and without deduction on account of the surplus of thirty dollars realized at the second sale: *Thomp-*

son v. Kelly, 101 Mass. 291; 3 Am. Rep. 353. A master and commissioners in partition parted a decedent's land, and laid out a street bounding on the line of an adjoining land-holder. Afterwards, but before the petition was put upon record or the street opened, the latter laid out a town plat, which was lithographed. It exhibited the street, with streets on his own plat opening into it, but the seller gave no information that the first-named street was on his neighbor's land. He sold lots at auction according to the plat which was exhibited on the day of sale. The plat of the commissioners was afterwards set aside, and the street vacated. *Held*, that the vendor was liable for damages to a vendee of lots for a diminution in the value thereof caused by the non-existence of the vacated street: *McCall v. Davis*, 56 Pa. St. 431; 94 Am. Dec. 92.

§ 220. **Fictitious Bids—"Puffers"—Agreements not to Compete.**—The best statement of the state of the English law as to illusory bids and puffing at auctions, up to the year 1850, will be found in the preamble of Lord St. Leonards's act, passed in that year. It recited that "whereas there is at present a conflict between her majesty's courts of law and equity in respect to the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled." The statute then declared invalid sales of land by auction where a puffer was employed; that at sales "without reserve" the seller nor any one for him should bid; that at sales subject to the right of the seller to bid, it should be lawful for the seller or any one person to bid.¹ In the American courts, raising the price at an

¹ 30 & 31 Vict., c. 48; and see *Jacob & W.* 389; *R. v. Marsh*, 3 Warlow v. Harrison, 1 El. & E. 309; *Bexwell v. Christie*, 1 Cowp. 20; *Howard v. Castle*, 6 Term Rep. 642; *Crowder v. Austin*, 3 Bing. 368; *Green v. Baverstock*, 14 Com. B., N. S., 204; *Conolly v. Parsons*, 3 Ves. 625; *Brantley v. Alt*, 3 Ves. 624; *Smith v. Clarke*, 12 Ves. 477; *Bowles v. Round*, 5 Ves. 508; *Jervoise v. Clarke*, 1 Jacob & W. 331; *Meadows v. Tanner*, 5 Madd. 34; *Twining v. Morrice*, 2 Brown Ch. 326; *Mason v. Armitage*, 13 Ves. 25; *Fuller v. Abrahams*, 6 Moore, 316; *Flint v. Woodin*, 9 Hare, 618; *Mortimer v. Bell*, 11 Jur., N. S., 897; *Icely v. Grew*, 6 Car. & P. 671; *Gilliat v. Gilliat*, L. R. 9 Eq. 60; *Parfitt v. Jepson*, 46 L. J. Com. P. Div. 529.

auction sale by fictitious bids or "puffers" is a fraud on the buyer, for which the sale will be set aside on his application.¹ At a sale of several lots at auction, evidence

¹ *Wheeler v. Collier*, 1 Wood. & M. 125; *Moncrieff v. Goldsborough*, 4 Har. & McH. 282; 1 Am. Dec. 407; *Troughton v. Johnston*, 2 Hayw. 328; 2 Am. Dec. 626; *Steele v. Ellmaker*, 11 Serg. & R. 86; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Fisher v. Hersey*, 17 Hun, 370; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Baham v. Bach*, 13 La. 287; 33 Am. Dec. 561; *Hinde v. Pendleton*, Wythe, 144; *Morehead v. Hunt*, 1 Dev. Eq. 65; *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Donaldson v. McRoy*, 1 Browne, 346; *Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Pennock's Appeal*, 14 Pa. St. 446; 53 Am. Dec. 561; *Bailey v. Morgan*, Busb. 352; *Whitaker v. Bond*, 63 N. C. 290; *Staines v. Shore*, 16 Pa. St. 203; 55 Am. Dec. 492; *Curtis v. Aspinwall*, 114 Mass. 187; 19 Am. Rep. 332; *Peck v. List*, 23 W. Va. 338; 48 Am. Rep. 398; *McDonnell v. Sims*, 6 Ired. Eq. 278; *Reynolds v. Dechamus*, 24 Tex. 174; 75 Am. Dec. 101; *Woods v. Hall*, 1 Dev. Eq. 411; *Martin v. Ranlett*, 5 Rich. 541; *Davis v. Petway*, 3 Head, 637; 75 Am. Dec. 789; *Miller v. Baynard*, 2 Houst. 559; 83 Am. Dec. 168. The owner of property instructed the auctioneer to take fourteen thousand five hundred dollars for it. At the sale the real biddings stopped at twenty thousand dollars, but the auctioneer by fictitious bids ran the price up to forty thousand dollars, at which it was knocked down to F. *Hehl*, that this was a fraud upon F. which the court would relieve: *Vezier v. Williams*, 8 How. 135. In this case the court said: "By-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud, and avoids the sale: *Cowp. 395*; 6 B. Mon. 630; 11 Serg. & R. 86; 4 Har. & McH. 282; *Babington on Auctions*, 45; 3 Bing. 368; 2 Car. & P. 208; 6 Term Rep. 642; *Rex v. Marsh*, 3 Younge & J. 331; 11 Moore, 283. He may fix a minimum price, or give notice of by-bids, and thus escape censure: *Ross on Sales*, 311; *Howard v. Castle*, 6 Term Rep.

642. But this shows that, without such notice, it is bad to resort to them: *Crowder v. Austin*, 3 Bing. 338; 3 Younge & J. 331. 'The act itself is fraudulent,' says Lord Tenterden: *Wheeler v. Collier*, 1 Moody & M. 126. The by-bidding deceives, and involves a falsehood, and is therefore bad. It violates, too, a leading condition of the contract of sales at auction, which is, that the article shall be knocked off to the highest real bidder, without puffing: 2 Kent's Com. 538, 539. It does not answer to apologize and say that by-bidding is common. For, observed Lord Mansfield, 'gaming, stock-jobbing, and swindling are frequent; but the law forbids them all': *Cowp. 397*. In *Bexwell v. Christie*, *Cowp. 396*, the pole-star on this whole subject, it is said: 'The basis of all dealings ought to be good faith. So more especially in these transactions, where the public are brought together in a confidence that the articles set up for sale will be disposed of to the highest real bidder.' Even in a court of law, Lord Kenyon has, with true regard to what is honorable and just, said: 'All laws stand on the best and broadest basis, which go to enforce moral and social duties': *Pasly v. Freeman*, 3 Term Rep. 64; see also *Bruce v. Ruler*, 2 Man. & R. 3. And in *Howard v. Castle*, 6 Term Rep. 642, he held that Lord Mansfield's doctrine, that all sham bidding at auctions is a fraud, was a doctrine founded 'on the noblest principles of morality and justice.' Nor does it lessen the injury or the fraud if the by-bidding be by the auctioneer himself. He, being agent of the owner, is equally with him forbidden by sound principle to conduct clandestinely and falsely on this subject: *Cowp. 397*. All should be fair,—above board. Indeed, in point of principle, any fraud by auctioneer is more dangerous than by owners themselves. The sales through the former extend to many millions annually, and are distributed over the whole country, and the acts accompanying them are more confided in as

that puffers were employed to bid upon some of the lots is admissible to show that their bids upon another lot

honest and true than acts or statements made by owners themselves in their own behalf, and to advance their own interests. Great care is therefore proper to preserve them unallied, and to discourage and repress the smallest deviations in them from rectitude. Here the auctioneer virtually said to his hearers, when he made a fictitious bid: 'I have been offered so much more for this property.' But he said it falsely, and said it with a view to induce the hearers to offer still more. He averred it as a fact, and not an opinion; and as a fact peculiarly within his knowledge. Now if, under such an untrue and fraudulent assertion, persons were persuaded to give more, — relying, as they had a right to, on the truth of what was thus more within the personal knowledge of the auctioneer, and was publicly and expressly alleged by him, and being of course more willing to give higher for what others had offered more, who probably were acquainted with such property and had means to pay for it, — they were imposed on and injured by the falsehood. It is said: 'A naked, willful lie, or the assertion of a falsehood knowingly, is certainly evidence of fraud'; 2 Mill Const. 8. The following authorities support the views here laid down: 3 *Younge & J.* 331; *Moody & M.* 123; 2 *Car. & P.* 208; *Bexwell v. Christie*, Cowp. 395; *Howard v. Castle*, 6 Term Rep. 642; 1 *Hall*, 146; 1 *Dev.* 35; 6 *Clark & F.* 329, 444. Some cases and some reasoning found in them attempt to sanction a contrary doctrine, if the by-bids were made merely to prevent a sacrifice of the property, — a 'defensive precaution' — but not otherwise: *Connolly v. Parsons*, 3 Ves. 625, note; *Smith v. Clarke*, 12 Ves. 477; *Steele v. Ellmaker*, 11 Serg. & R. 83; *Woodward v. Miller*, 1 Coll. C. C. 279; 5 *Madd.* 34. These exceptions still concede that the by-bidding, when an artifice to mislead the judgment and inflame the zeal of others, — 'to screw up and enhance the price,' in the language of Sir William Grant, — is fraudulent, and makes the sale void: 12 Ves. 483; 2 *Kent's Com.*

537. Some cases hold, too, that the by-bidding will not vitiate, if real bids besides those of the vendee occurred after: 3 Ves. 620. But neither of these excuses or apologies existed here. These by-bids were made after some thousand dollars had been offered over the value of the mills, as estimated by the owners themselves, and were palpably made 'to screw up' or enhance the price. Any other excuses, which have ever availed, either are anomalies, or rest on a false analogy. Thus at one time in England duties on auctions were remitted, if the property was bought in by the owner: 3 Ves. Jr. 17, 621; 1 *Fonb. Eq.* 226. This, however, was founded on the theory that no sale had taken place, and hence no duty should be paid, rather than that a sale under such circumstances was valid. It therefore strengthens rather than impairs the view taken of the present case." In *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 493, it was held that the sale was vitiated by the employment of puffers, whether the buyer got the worth of his money or not. *Gibson, C. J.*, said: "We held in *Pennock's Appeal*, 14 Pa. St. 449, 53 Am. Dec. 561, that the employment of even a single puffer vitiates the sale. In the present case the ruling judge instructed the jury that if the horse was actually worth the sum to be paid for him, the buyer got the value of his money and could not have been defrauded. The fallacy of the principle is in assuming that there is a standard of value independent of the wishes and wants of the bidders, and that every man is willing to buy by it. A man proposes to sell his horse for a fair price to another, who declines, because he has no use for him, and does not choose to take the risk of getting less for him than he gave, with a certainty of losing his trouble and the expense of keeping in the mean time; but the case would be different did the owner make it worth his while to purchase with a view to profit on a resale. What is the worth of anything? The apothegm of *Hudibras* answers truly, 'Just so much money as 't will bring.' A man is de-

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were *mala fide*.¹ But it is not illegal to place a limit on the price below which the property must not be sold, and to withdraw it if it does not reach that figure,²

frauded whenever he is incited by artful means to bid more than he otherwise would. He has a right to buy at an undervalue where the necessities of the owner compel him to sell; and whenever the price is ever so little enhanced by a secret contrivance he is cheated. A sale by auction presupposes a sacrifice, or at least a willingness to sell for what can be had; but should the vendor stick for the last penny, it would be idle to set the property up, because his price could be as readily obtained at private sale. Should he, however, see fit to make the experiment, his object could be attained by directing the auctioneer not to let the property go for less than his estimate of its market value; or if he propose to sell without reservation as to price, let him openly reserve a right to bid. For no fair purpose is the employment of a puffer necessary; but it must vitiate every sale in which recourse is had to it." In *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332, the court say: "There is some diversity in the decisions as to the circumstances under which by-bidding will invalidate a sale at auction. But it is clear, both upon principle and the weight of authorities, that when the sale is advertised or stated to be without reserve, the secret employment by the seller of puffers or by-bidders renders the sale voidable by the buyer: *Phippen v. Stickney*, 3 Met. 384, and cases cited; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Veazie v. Williams*, 8 How. 134; *Thornett v. Haines*, 15 Mees. & W. 367. The offer of property at auction, without reserve, is an implied guaranty that it is to be sold to the highest bidder, and each bidder has the right to assume that all previous bids are genuine. The seller in substance so assures him, and the secret employment by the seller of an agent to make fictitious bids is equivalent to a false representation by him as to a matter in which he is bound to speak the truth and act in good faith. The real bidder is deceived, and the

price is enhanced, by artifice and false pretenses. In the case at bar the seller stated in his advertisement that 'the sale will be positive.' This is equivalent to stating that it would be without reserve, and we think that the evidence offered by the buyer of by-bidding at the auction sale should have been admitted. Though his offer was to show by-bidding upon the other lots embraced in the sale, and not upon the lots bid off by him, the principle is the same. The sale was of a large piece of land cut up into small lots. The sales of all the lots were on the same day and were parts of the same transaction. Any artifice or fraud used to deceive the bidders and to enhance the price of the lots first sold would tend to fix the apparent value of all the lots, and to mislead the judgment of the real bidders upon the lots afterwards sold. As the purchase by the buyer in this case was of the last lots sold, it was competent for him to show that the seller secretly procured fictitious bids to be made upon the lots previously sold, and that he was deceived and misled thereby. There must, therefore, be a new trial in both the suits. If the buyer succeeds in proving his allegation of the seller's fraud by employing by-bidders, the seller cannot maintain his action against him, and he is entitled to recover back the deposit paid to the auctioneer." One who acts simply as auctioneer or crier for an officer, and in his presence, at a sale of property under a writ, has a right to bid at the sale; but if the crier was himself conducting the sale, then he would have no such right: *Swires v. Brotherline*, 41 Pa. St. 135; 80 Am. Dec. 601.

¹ *Yerkes v. Wilson*, 81* Pa. St. 9.

² *Towle v. Leavitt*, 23 N. H. 360; 45 Am. Dec. 195; *Wolfe v. Lyster*, 1 Hall, 146; *Hazul v. Dunham*, 1 Hall, 655; *Williams v. Poor*, 3 Cranch C. C. 221; *Steele v. Ellmaker*, 11 Serg. & R. 86. In *Baham v. Bach*, 13 La. 287, 33 Am. Dec. 561, it was said: "In the case of *Corryolles v. Mossy*, 2 La. 504,

nor to make fictitious bids, or employ a person to do so, for the sole purpose of preventing a sacrifice of the property offered for sale.¹ A sale where fictitious bids have been made, or "puffers" employed, will not be set aside where the purchaser has acquiesced for a time, and the price is not, after all, exorbitant,² or the purchaser after knowledge of the fact confirms the sale.³ As soon as the purchaser finds out that there has been by-bidding, he must make his election to rescind or abide by the contract. Thus where, at a sale by auction of land (sold as containing a gold mine), a by-bidder was secretly employed by the vendors to run up the land, and the vendees did not bring their bill for a rescission of the contract until twelve months or more after they had knowledge of that fact, and in the mean time, or a portion thereof, continued to work and explore the land, it was held that this was too long a delay in notifying the vendors of their wish to annul the contract.⁴ The purchaser must return the property when he discovers the fraud.⁵ A by-bidder who, by agreement with the owner, runs up

the supreme court of this state held that an owner might withdraw his property before the highest bid was accepted by the auctioneer. But this gives the owner no right to bid, unless he publicly reserves to himself that right; still less can he bid through the auctioneer. The duty of the auctioneer is to sell the property, and to receive the bids offered, not to make them. We do not censure the conduct of the auctioneer in this instance, because we are aware it is the general usage to conduct sales at auction in this manner; but it is a usage which we can neither justify nor recognize in the administration of justice. It is equally repugnant to public policy, and to that fairness which ought to exist, and which people have a right to expect in a sale of property avowedly offered to the highest bidder."

¹ *Wolfe v. Lyster*, 1 Hall, 146; *Jenkins v. Hogg*, 2 Tread. Const. 821; *Reynolds v. Dechamus*, 24 Tex. 174; 76

Am. Dec. 101; *Steele v. Ellmaker*, 11 Serg. & R. 86; *Millar v. Campbell*, 3 A. K. Marsh. 526; *Lee v. Lee*, 19 Mo. 420; *Davis v. Petway*, 3 Head, 667; 75 Am. Dec. 789; *Miller v. Baynard*, 2 Houst. 559; 83 Am. Dec. 168.

² *Backenstoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592; *Latham v. Morrow*, 6 B. Mon. 630; *Tomlinson v. Savage*, 6 Ired. Eq. 430. See *McDowell v. Simms*, Busb. Eq. 130; 57 Am. Dec. 595, where the setting aside of the sale on the ground of by-bidding was not asked for a year and a half after its discovery.

³ *Backenstoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592.

⁴ *McDowell v. Simms*, Busb. Eq. 130; 57 Am. Dec. 595.

⁵ *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 492; *McDowell v. Simms*, Busb. Eq. 130; 57 Am. Dec. 595.

the property at an auction, and it is knocked down to him, may hold the property against such owner.¹

Combinations and agreements between parties not to bid against each other at a public auction sale are illegal.² An agreement between two persons, who desire to purchase articles at a sale, that they will not bid against each other, but that one shall purchase them and divide them, is illegal and void.³ Where two persons are bidding as agents for a third, an agreement between them that one shall not bid does not vitiate the sale.⁴ So an agreement of several to unite and bid for their joint benefit is not illegal if honest.⁵ So an attempt to prevent bidding is not effectual unless successful.⁶ An association formed for the purpose of bidding at an auction sale is lawful, and may become the purchaser, unless formed for the purpose of preventing competition.⁷ So where

¹ *Troughton v. Johnston*, 2 Hayw. 328; 2 Am. Dec. 626.

² *Jones v. Caswell*, 3 Johns. Cas. 29; 2 Am. Dec. 134; *Hook v. Turner*, 22 Mo. 333; *Thompson v. Davies*, 13 Johns. 112; *Brisbane v. Adams*, 3 N. Y. 130; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Gardiner v. Morse*, 25 Me. 140; *Troup v. Sherwood*, 4 Johns. Ch. 228; *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389; *Slingluff v. Eckel*, 24 Pa. St. 472; *Dick v. Lindsay*, 2 Grant Cas. 431; *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179; *Hook v. Turner*, 22 Miss. 333; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Dudley v. Little*, 2 Ohio, 504; 15 Am. Dec. 575; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; 46 Am. Dec. 58; *Carrington v. Caller*, 2 Stew. 175; *Piatt v. Oliver*, 1 McLean, 295; and cannot be ratified: *Wheeler v. Wheeler*, 5 Lans. 355.

³ *Doolin v. Ward*, 6 Johns. 194; *Wooton v. Hinkle*, 20 Mo. 290; *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179; *Wilbur v. How*, 8 Johns. 444; *Martin v. Ranlett*, 5 Rich. 541; 57 Am. Dec. 770; *Hawley v. Cramer*, 4 Cow. 718.

⁴ *Aller v. Stephanus*, 18 Tex. 658.

⁵ *James v. Fulcrold*, 5 Tenn. 512; 55 Am. Dec. 743; *Goode v. Hawkins*, 2 Dev. Eq. 397; *Smull v. Jones*, 6 Watts,

& S. 122; *Piatt v. Oliver*, 1 McLean, 301; *Hunt v. Elliott*, 80 Ind. 253; 41 Am. Rep. 794; *Switzer v. Skiles*, 8 Ill. 529; 44 Am. Dec. 723.

⁶ *Haynes v. Crutchfield*, 7 Ala. 189; *Buckley v. Briggs*, 30 Mo. 452.

⁷ *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Kearney v. Taylor*, 15 How. 494, Mr. Justice Nelson saying: "There are some cases deriving their principles from the severe doctrines of *Bexwell v. Christie*, Cowp. 396, and *Howard v. Castle*, 6 Term Rep. 642, to be found in books of high authority in this country, that would carry us the length of avoiding this sale, simply on the ground of this association having been formed for the purpose of bidding off the premises, for the reason that all such associations tend to prevent competition, and thereby to a sacrifice of the property: 3 Johns. Cas. 209; 6 Johns. 194; 8 Johns. 444; 13 Johns. 112; 2 Ham. 505; 10 N. J. L. 87; 2 Kent's Com. 539; 1 Story's Eq. Jur., sec. 293. Later cases, however, have qualified this doctrine by taking a more practical view of the subject and principles involved, and have placed it upon ground more advantageous to all persons interested in the property, while at the same time affording all

the intention of such an agreement is to permit the parties to obtain small quantities of the property which they desire, the lot offered being larger than any one of them desires or is able to purchase, there is no illegality in it.¹

proper protection against combinations to prevent competition: 2 Dev. 126; 3 Met. 384; 25 Me. 140; 2 Tread. Const. 821; 3 Ves. 625; 12 Ves. 477; 11 Serg. & R. 86. It is true that in every association formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the means of the individual, or might absorb more of them than he would desire to invest in the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with. Much of the property of the country is in the hands of incorporated or joint-stock companies; the business in which they are engaged being of a magnitude requiring an outlay of capital that can be met only by associated wealth. Railroads, canals, ship-channels, manufacturing establishments, the erection of towns, and improvement of harbors are but a few of the instances of private enterprise illustrating the truth of our remark. It is apparent that if, for any cause, any one of these, or of similar masses of property, should be brought to the stake, competition at the sales could be maintained only by the bidders representing similar companies, or associations of individuals of competent means. Property of this description cannot be divided, or separated into fragments and parcels, so as to bring the sale within the means of individual bidders. The value consists in its entirety, and in the use of it for the pur-

poses of its original erection; and the capital necessary for its successful enjoyment must be equal not only to purchase the structures, establishments, or works, but sufficient to employ them for the uses and purposes for which they were originally designed. These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders. We must, therefore, look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it, and if, upon such examination, it is found that the object and purpose are not to prevent competition, but to enable, or as an inducement to, the persons composing it to participate in the biddings, the sale should be upheld; otherwise, if for the purpose of shutting out the competition, and depressing the sale, so as to obtain the property at a sacrifice. Each case must depend upon its own circumstances."

¹ *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Switzer v. Skiles*, 8 Ill. 529; 44 Am. Dec. 723; *Smull v. Jones*, 1 Watts & S. 129; *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Phippen v. Stickney*, 3 Met. 388, the court saying: "It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we

An agreement by a guardian or administrator to offer the real estate of his ward or intestate for sale by auction, and to sell it to a person at an agreed price, provided no higher sum is bid, is not invalid.¹ A sale under process of law, by auction, cannot be set aside for mere inadequacy of price: fraud also must be shown.² In an action against a married woman for breach of a written agreement for the purchase of land sold to her by auction, parol evidence that the plaintiff requested her to bid on the property as an under-bidder, and told her that she would not be bound to take the property, but might, if her husband desired; and that she did not read the agree-

cannot judicially declare that every contract between two or more individuals, in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void as a fraud upon the rights of the vendor, and as against public policy, merely because he who seeks to enforce the contract may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed, are of frequent occurrence in sales of large magnitude, where two or more persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding. By such an association as is just supposed, the interest of the vendor, as well as that of the vendees, would be directly advanced. The extent to which the doctrine of invalidating such contracts can be safely carried would rather seem to embrace within the rule all cases of fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this the application of the principle contended for may be found productive of mischief, and an unwarrantable interference with the course of business

in auction sales. We are therefore of opinion that an agreement between A and B, that A will permit B to become the purchaser of certain property about to be offered at sale at public auction, and that A shall participate with B in the benefits of the purchase, will or will not be fraudulent as the circumstances of the case show innocence of intention or a fraudulent purpose in making such agreement; that where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for sale below the fair market value, it will be illegal, and may be avoided as between the parties as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding.

¹ *Aliter* if the agreement is to sell at a fixed price, disregarding other bids: *Hunt v. Frost*, 4 Cush. 54.

² *White v. Damon*, 7 Ves. Jr. 34; *Burrows v. Locke*, 10 Ves. Jr. 474; *Livingston v. Byrne*, 11 Johns. 555; *Den v. Zellers*, 7 N. J. L. 153; *Stockdale v. Young*, Rice Eq. 3.

ment or know its contents when she signed it, does not show any fraud practiced on third persons, or any illegal contract between the plaintiff and defendant, and is admissible to control her written agreement.¹

ILLUSTRATIONS. — A parcel of land owned by a company to which A and B both belonged was sold at auction to A, and part of the price was paid by him to B, and a bond and mortgage given for the remainder. On a bill filed by A, alleging that the sale was fraudulent, on the ground that there had been under-bidding on behalf of B, to inflate the price of the property, *held*, that as A was one of the owners of the land, there could have been no under-bidding without his own authority; and that he should have proved that it was done by a secret contrivance, without his knowledge: *Small v. Boudinot*, 9 N. J. Eq. 381. A party at an auction sale of slaves was known to intend purchasing certain slaves who had been for many years in his family, and to whom he had supposed he had a good title, at any price, and a by-bidder was employed, by reason of which the plaintiff bought the slaves at an enormous price. *Held*, that the plaintiff was entitled to relief against such illegal by-bidding, and that he should have the slaves at a fair price, to be determined by commissioners: *Hinde v. Pendleton*, Wythe, 144. Where an auctioneer used fraud to enhance the price of property sold at auction, *held*, that in an equity suit by the purchaser for relief against the sale, it was not necessary to make the auctioneer a party: *Veazie v. Williams*, 8 How. 134. A piece of land was advertised for sale. Two adjoining land-owners were desirous of purchasing it; they agreed that one alone should attend the sale, and purchase, if it should be sold, for a sum not exceeding a sum named. If the land was purchased, terms were arranged, and it was to be divided between them. *Held*, that the agreement between the purchasers was not contrary to equity, and that it did not vitiate the contract: *In re Carew*, 26 Beav. 187; 28 L. J. Ch. 218; *Galton v. Emuss*, 8 Jur. 507; 13 L. J. Ch. 388.

§ 221. **The Auctioneer's Compensation.** — The general rules as to the compensation of agents² apply to the compensation of the auctioneer; e. g., that the amount of his compensation is fixed in a particular case by what others in the business doing the same work are accustomed to

¹ *Faucett v. Currier*, 109 Mass. 79.

² See Part I., Agency.

receive;¹ that he is entitled to be reimbursed his expenses and disbursements;² and such damages as he has sustained in executing his commission;³ that he is not entitled to compensation where he has been guilty of negligence or fraud.⁴ The rule is well established that where an auctioneer intrusted with the sale of an estate is the *causa causans* of the sale (as by advertising and putting up the estate for sale by auction, which the purchaser afterward attended), he is entitled to his commission, even though before the actual sale the vendor withdrew the property from sale by him.⁵ Where the conditions of an auction sale expressly stipulate that an auctioneer's fees of a special sum shall be paid to the auctioneer on the day of sale, he may sue the purchaser in his own name to recover such sum; but his right to recover will depend on the validity of the contract to purchase as between buyer and seller.⁶ One representing himself to be the owner of real estate, who employs an auctioneer to sell the same under an agreement that in event of a sale the auctioneer shall receive for his services a percentage on the amount bid, cannot, after a sale by the auctioneer, avoid paying him for his services because the purchaser refuses to take the property, owing to a real or alleged defect in the title.⁷ Where he sells a number of lots for one owner severally, he is entitled to a distinct commission upon each sale.⁸ Under the New York statute prohibiting an auctioneer from demanding more than two and one half per cent commission "unless by a previous agreement in writing between him and the owner," the agreement is sufficient

¹ See Part I., Agency.

² *Id.*; *Robinson v. Green*, 3 Met. 159.

³ *Id.*; *Russell v. Miner*, 5 Lans. 537.

⁴ *Id.* If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor: *Denew v. Daverell*, 3 Camp. 451.

⁵ *Green v. Bartlett*, 14 Com. B., N. S., 681; 32 L. J. Com. P. 261; 11 Week. Rep. 834; 8 L. J., N. S., 503.

⁶ *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243.

⁷ *Middleton v. Findla*, 25 Cal. 76.

⁸ *Wells v. Day*, 124 Mass. 38. Unless, of course, he contracted with the owner for an entire sum for the whole service: *Robinson v. Green*, 3 Met. 159.

if signed by the owner, though not signed by the auctioneer.¹ The statute of New York which fixes the amount of an auctioneer's fees, in the absence of an agreement in writing, refers only to his services as auctioneer. He is entitled, in addition, to his disbursements and expenses, and reasonable compensation for extraordinary services beyond the mere selling in public to the highest bidder.² He is not entitled to commissions on a bid not complied with,³ nor has he a right to charge a fee for an adjournment of a sale;⁴ nor can he recover commissions on sales made where he has no license to sell.⁵

ILLUSTRATIONS.—A lease of real estate for fifteen years was sold by auction. The written terms of the lease were "the lessee will pay the auctioneer his fee of \$10 per year, being \$150 in cash, this day." At the foot of these terms was a writing signed by the purchaser at the time of the sale, stating that he had leased the real estate at a certain sum per annum, and agreed to comply with the above terms. The lease was made and accepted by the purchaser. *Held*, that the auctioneer might maintain an action in his own name for the fees: *Muller v. Maxwell*, 2 Bosw. 355.

¹ *Carpenter v. Le Count*, 93 N. Y. 562.

² *Russell v. Miner*, 5 Lans. 537; 61 Barb. 534.

³ *Girardey v. Stone*, 24 La. Ann. 286; *Cochran v. Johnson*, 2 McCord, 21.

⁴ *Ward v. James*, 8 Hun, 526.

⁵ *Robinson v. Green*, 3 Met. 159.

PART IV.—BROKERS AND FACTORS.

CHAPTER XIX.

BROKERS AND FACTORS.

- § 222. Different classes of brokers and authority.
- § 223. What authority implied to brokers generally.
- § 224. What authority not implied to brokers generally.
- § 225. Broker's authority a limited one — His duties and liabilities.
- § 226. Broker's compensation.
- § 227. Factors and *del credere* agents.
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- § 230. What factor bound to do — His duties and liabilities.

§ 222. Different Classes of Brokers and Authority.—

A broker is an agent employed to make bargains and contracts between other persons in matters of trade or commerce.¹ The business must relate to property or money. An agent who negotiates a personal contract for work and labor is not a broker.² A broker is a mere negotiator between the parties; he is not intrusted with the possession of the property, and is not authorized to buy or sell in his own name.³ A salaried agent who does not act for a fee or rate per cent is not a broker.⁴ Of the different classes of brokers may be mentioned, as the most frequent, bill-brokers, stock-brokers, ship and insurance brokers, pawn-brokers, real estate brokers, and brokers simply so called, i. e., those who negotiate sales of goods

¹ Evans on Agency, 4; Story on Agency, sec. 23. "A broker is one who makes a bargain for another and receives a commission for so doing, as, for instance, a stock-broker"; Pott v. Turner, 6 Bing. 706, per Tindal, C. J.; Higgins v. Moore, 34 N. Y. 417. See cases cited in Lawson's Concordance, tit. Broker; Portland v. O'Neill, 1 Or. 218; Holt v. Green, 73 Pa. St. 198; 13 Am. Rep. 737. An unlicensed broker cannot recover compensation for services: Johnson v. Hulings, 103 Pa. St. 498; 49 Am. Rep. 131.

² Milford v. Hughes, 16 Mees. & W. 174. But see Scott v. Cousins, L. R. 4 Com. P. 177; Ex parte Cooke, L. R. 4 Ch. Div. 123.

³ Baring v. Corrie, 2 Barn. & Ald. 137; Hinckley v. Arey, 27 Me. 362.

⁴ Portland v. O'Neill, 1 Or. 218.

and merchandise of different kinds. BILL-BROKERS propose and conclude bargains between merchants and others in matters of bills and exchange; in other words, they negotiate the purchase and sale of negotiable paper; also called exchange brokers when they deal in foreign bills of exchange; INSURANCE BROKERS are those who effect insurance for their employers, and act as middle-men between the insurer and insured; MERCHANDISE BROKERS resemble factors, except that they do not have the possession or control of the goods as factors do; PAWN-BROKERS are lenders of money in small sums on the security of personal property left with them in pawn or pledge, and they receive a higher rate of interest than is usually allowed for the use of money; REAL ESTATE BROKERS are those who negotiate between the buyer and seller of real property, either finding a purchaser for one desirous to sell, or *vice versa*; they also manage estates, lease or let property, collect rents, and negotiate loans on bond and mortgage; SHIP-BROKERS attend to the freighting of ships, and to their sale and transfer; STOCK-BROKERS are those whose business it is to purchase or sell, on their client's order or request, the shares of stock of railroad companies and other corporations, and the bonds of such companies, or of governments, either national, state, or municipal. They use their own money (except that a "margin" or percentage of the price is required from the purchaser to secure the broker against loss by sudden fluctuation of the market), and buy in their own names, in which respect they differ from other classes of brokers.

A bill-broker cannot be held liable for bills sold by him which turn out to be worthless;¹ he is not answerable either for the insolvency of a purchaser.² Being intrusted with

¹ *Buddecke v. Alexander*, 20 La. Ann. 563.

² *Buddecke v. Alexander*, 20 La. Ann. 563. In an Illinois case a loan-broker was held liable to a lender on

real estate, for loss of a loan negotiated by the broker upon a mortgage which proved insufficient security in consequence of prior encumbrances: *Shipherd v. Field*, 70 Ill. 438.

the possession of the bills, he may receive payment of the purchase-money.¹ But a bill-broker who sells a note without disclosing his principal, which turns out to be forged, is liable for the sum paid by the purchaser, even though he has paid it over to his principal.² A bill-broker is not a person known to the law with certain duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.³ Note-brokers are liable as principals to persons dealing with them, and knowing them to be engaged in such agency, where it does not otherwise appear that they are acting as agents, or if they are, that they disclosed the name of their principal, or that credit was given to the principal.⁴ An insurance broker has authority to adjust losses, and to receive payment of them;⁵ to abandon in case of a loss;⁶ to arbitrate a disputed loss;⁷ to make the contract of insurance in his own name and sue upon it.⁸ But an insurance broker, em-

¹ *Lentillon v. Vorwerck*, Hill & D. 443.

² *Morrison v. Currie*, 4 Duer, 79; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bell v. Cafferty*, 21 Ind. 411; *Dumont v. Williamson*, 18 Ohio St. 515; 98 Am. Dec. 183; see note in 53 Am. Dec. 693; *Merriam v. Walcott*, 3 Allen, 258, 83 Am. Dec. 69, where it is said: "The first question presented by this case is, whether a person who purchases a note of a broker for cash, and takes the note by delivery, can recover back the money paid, if the maker's signature turns out to be forged. The text-books state the law to be, that he can recover it back on the ground of an implied warranty that the note is in reality what it purports to be: *Bayley on Bills*, 148; *Chitty on Bills*, 10th Am. ed., 245. The English cases are referred to in these treatises. The recent case of *Gurney v. Womersley*, 4 El. & B. 132, asserts the same doctrine. It has been repeatedly so held in New York: *Markle v. Hatfield*, 2 Johns. 455; 3

Am. Dec. 446; *Herrick v. Whitney*, 15 Johns. 240; *Shaver v. Ehle*, 16 Johns. 201; *Murray v. Judah*, 6 Cow. 484; *Canal Bank v. Bank of Albany*, 1 Hill, 287. It is so held in Rhode Island: *Aldrich v. Jackson*, 5 R. I. 218; also in Vermont: *Thrall v. Newell*, 19 Vt. 202; 47 Am. Dec. 682." As to the rights, duties, and liabilities of a bill-broker, in cases depending upon particular facts, see *Arnold v. Clark*, 1 Sand. 491; *Clark v. Merchants' Bank*, 1 Sand. 498.

³ *Foster v. Pearson*, 1 Crompt. M. & R. 849; 5 Tyrw. 255.

⁴ *Thompson v. McCullough*, 31 Mo. 224; 77 Am. Dec. 644.

⁵ *Richardson v. Anderson*, 1 Camp. 43; note *Bousfield v. Cresswell*, 2 Camp. 545.

⁶ *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268.

⁷ *Goodson v. Brooke*, 4 Camp. 163.

⁸ *Baring v. Corrie*, 2 Barn. & Ald. 137; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583. See *Freeman v. Fulton Ins. Co.*, 14 Abb. Pr. 398.

ployed by the insurer, has no authority to pay losses to the insured on behalf of the insurer.¹ A real estate broker has ordinarily power only to find a purchaser or negotiate a purchase, and not to sign a contract.² But he may be given power by parol to make a contract within the statute of frauds,³ but not a deed.⁴ His agency ceases when the transaction is concluded.⁵ A stock-broker who purchases stock on an order from a customer must hold it a reasonable time, and not sell without notice to him;⁶ he is entitled to recover from his customer what he has paid,⁷ but he has no right to buy in stock to cover a sale.⁸ A stock-broker, a member of an exchange, is authorized to purchase according to the usages of the board.⁹ The engagement of a stock-broker, under an agreement with a customer to buy and carry stock, is not to procure and furnish stock when required, but to purchase and hold the number of shares ordered, subject to the payment of the purchase price.¹⁰ A broker who disposes of bank stock for another is the agent of both the owner and the purchaser.¹¹ Stock-brokers cannot revoke their general agreement to buy, hold, and sell stocks for a commission without notice, and if they do so revoke, they are liable for damages sustained by their employers by reason of such revocation.¹² Where a speculator in stocks is in debt to his broker for advances, and is in poor credit, the

¹ *Bell v. Auldjo*, 4 Doug. 48.

² *Rutenberg v. Main*, 47 Cal. 213; *Rowe v. Stevens*, 35 N. Y. Sup. Ct. 189; *Glentworth v. Luther*, 21 Barb. 145; *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Ryon v. McGee*, 2 Mackey, 17.

³ *Rutenberg v. Main*, 47 Cal. 213; *Pringle v. Spaulding*, 53 Barb. 21.

⁴ *Blood v. Goodrich*, 12 Wend. 525; 27 Am. Dec. 152.

⁵ *Walker v. Derby*, 5 Biss. 134.

⁶ *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Markham v. Jaudon*, 41 N. Y. 235; *Cameron v. Durkheim*, 55 N. Y. 425; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80.

⁷ *Durant v. Burt*, 98 Mass. 161.

⁸ *White v. Smith*, 54 N. Y. 522. As to the duties of a stock-broker, when he is entitled to his commissions, and the rights of his employer as to notice, see *Durant v. Burt*, 98 Mass. 161; *Nourse v. Prime*, 4 Johns. Ch. 490; *Brass v. Worth*, 40 Barb. 648; *Sterling v. Jaudon*, 48 Barb. 459; *Knowlton v. Fitch*, 48 Barb. 593.

⁹ *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311. See note in 75 Am. Dec. 313-316, as to the rights, duties, and liabilities of stock-brokers.

¹⁰ *Taussig v. Hart*, 58 N. Y. 425.

¹¹ *Colvin v. Williams*, 3 Har. & J. 38; 5 Am. Dec. 417.

¹² *White v. Smith*, 6 Lans. 5; 54 N. Y. 522.

broker may refuse to obey an order to sell and convert the proceeds into other stocks thought by him less safe, and, even though such stocks go up afterwards, the broker is not liable to his principal for refusing to obey his order.¹

§ 223. What Authority Implied to Brokers Generally.

—A broker in general has an implied authority to sign the bought and sold notes and bind both parties;² or to sell by sample or with warranty,³ if such be the custom as to the thing sold;⁴ to bind his principal to any price at which he buys or sells;⁵ to guarantee the payment of a security sold;⁶ to adjust a policy;⁷ to pledge stock which he has bought for his principal with money advanced by himself.⁸ When a contract for the purchase or sale of shares has been entered into between individuals through their respective brokers, or with the intervention, as purchasers or sellers, of jobbers, members of the stock exchange, the lawful usages and rules of the stock exchange are incorporated into and become part and parcel of all such contracts, and the rights and liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules and usages.⁹

¹ Jones v. Gallagher, 3 Utah, 54.

² Saladin v. Mitchell, 45 Ill. 79; Coddington v. Goddard, 16 Gray, 436; Parton v. Crofts, 16 Com. B., N. S., 11. A broker who is the agent of both parties in signing bought and sold notes is in all other respects the agent of the party who first employed him: Schlesinger v. R. R. Co., 13 Mo. App. 471.

³ Andrews v. Kneeland, 6 Cow. 354; Boorman v. Jenkins, 12, Wend. 566; 27 Am. Dec. 158; Waring v. Mason, 18 Wend. 425.

⁴ Upton v. Suffolk Co. Mills, 11 Cush. 586; 59 Am. Dec. 163; Smith v. Tracy, 36 N. Y. 79; Brady v. Todd, 9 Com. B., N. S., 592.

⁵ Wilkinson v. Churchill, 114 Mass. 184.

⁶ Frevall v. Fitch, 5 Whart. 325; 34 Am. Dec. 558.

⁷ Richardson v. Anderson, 1 Camp. 43; note Hartford Ins. Co. v. Smith, 3 Col. 422.

⁸ Wood v. Hayes, 15 Gray, 375.

⁹ Lawson on Usages and Customs, sec. 144; Young v. Cole, 3 Bing. N. C. 724; Child v. Morley, 8 Term Rep. 610; Bayliffe v. Butterworth, 1 Ex. 426; Taylor v. Story, 2 Com. B., N. S., 175; Sutton v. Tatham, 10 Ad. & E. 27; Greaves v. Legg, 11 Ex. 642; 2 Hurl. & N. 210; Evans on Agency, c. 2, sec. 2; Robinson v. Mollett, L. R. 7 H. L. 802; Maxted v. Paine, L. R. 4 Ex. 210; Taylor v. Stray, 2 Com. B., N. S., 175; Smith v. Lindo, 5 Com. B., N. S., 587; Pidgeon v. Burslem, 3 Ex. 465; Rosewarne v. Billing, 15 Com. B., N. S., 316; Jessopp v. Lutwyche, 10 Ex. 614; Knight v. Chambers, 15 Com. B. 562; Beeston v. Beeston, 1 L. R. Ex. Div. 13; Bowring v. Shepherd,

ILLUSTRATIONS.—B, a broker, advised A to sell certain unregistered bonds, and buy certain other bonds. A, in reply, by letter, said: "I am most anxious to get my money in registered bonds," authorized B to sell the bonds then held by B for him, "and invest the amount in the best paying and surest bonds that you know of. . . . As these bonds are all I possess, I am naturally always anxious about them, for the reason that if lost or stolen I could recover nothing. You will please at the results of the sale in the I. bonds (the ones recommended), or any sure road. I want registered bonds, of which I will have no trouble in drawing the interest. . . . I shall feel under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates." It was agreed that the bonds referred to by B were first-mortgage bonds. B in fact bought some first-mortgage and some second-mortgage bonds, all of which were unregistered. *Held*, that if he acted in good faith, it was within the scope of the authority conferred upon him by the letter of A: *Matthews v. Fuller*, 123 Mass. 446.

§ 224. What Authority not Implied to Brokers Generally.—A broker has no implied authority to buy and sell in his own name,¹ or on credit;² to receive a payment,³ unless the principal has clothed the broker with the possession or the apparent title of the thing sold;⁴

L. R. 6 Q. B. 309; *Grissell v. Bristowe*, L. R. 4 Com. B. 36; *Coles v. Bristowe*, L. R. 4 Ch. 3; *Duncan v. Hill*, L. R. 6 Ex. 255; L. R. 8 Ex. 242.

¹ *Gallup v. Lederer*, 1 Hun, 282; *Graham v. Duckwall*, 8 Bush, 12; *Saladin v. Mitchell*, 45 Ill. 79; *Baring v. Corrie*, 2 Barn. & Ald. 143.

² *Henderson v. Barnewell*, 1 Younge & J. 387; *Boorman v. Brown*, 3 Q. B. 511; *Wiltshire v. Sims*, 1 Camp. 258.

³ *Bassett v. Lederer*, 1 Hun, 274; *Higgins v. Moore*, 34 N. Y. 417; *Evans v. Waln*, 71 Pa. St. 69; *Baring v. Corrie*, 2 Barn. & Ald. 137; *Butler v. Dorman*, 68 Mo. 298; 30 Am. Rep. 795; *Doubleday v. Kress*, 50 N. Y. 410; 10 Am. Rep. 502; *Seiple v. Irwin*, 30 Pa. St. 513; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Bryce v. Brooks*, 26 Wend. 367; *Dunn v. Wright*, 51 Barb. 244; *Railroad Co. v. Roberts*, 4 Phila. 110; *Graham v. Duckwall*, 8 Bush, 12; *Parsons v. Martin*, 11 Gray, 111; *Deane v. Internat. Title Co.*, 47 Hun, 319.

⁴ *Clarke v. Meigs*, 10 Bosw. 337; *Bassett v. Lederer*, 1 Hun, 274; *Lentilhon v. Vowerek*, Hill & D. 443; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, where it is said: "The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to or power of disposition over the shares in question as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers. Simply intrusting the possession of a chattel to another, as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted: *Ballard v. Burgett*, 40 N. Y. 314. 'The mere possession of chattels, by whatever means acquired, if there be no other evidence of property, or authority to sell, from the true owner, will not enable the possessor to give a

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to delegate his authority;¹ to rescind the sale;² to submit disputes to arbitration;³ to act for both parties,⁴ except to sign a contract within the statute of frauds;⁵ to sell to himself.⁶ A broker who has bought stock for another with money advanced by himself, and holds it in his own name, may, so long as he has not been paid or tendered the amount of his advances, pledge it as a security for his own debt to a third person, without making himself liable to an action by his employer.⁷ The order of a customer to a broker to buy stock "on a sixty-days' buyer's option" does not authorize the broker to buy the stock himself, and hold it on his customer's account for sixty days.⁸ An authority to a broker to buy and load upon a vessel a cargo of produce does not, by implication, and in the absence of any sufficient custom, give to the agent the power to borrow, upon the credit of the principal, the money with which to make the purchase.⁹ Evidence that a parcel of land has doubled in value from May 1, 1871, to May 1, 1872, has no tendency to prove that a broker was not, in October, 1871, given authority under which he could, on May 20, 1872, sell the land for the smaller value.¹⁰ If a broker contracts, under the

good title': Per Denio, J., in *Covill v. Hill*, 4 Denio, 323. But if the owner intrusts to another not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power."

¹ See *ante*, Chapter VI., Delegation of Authority; *Henderson v. Barnwall*, 1 Younge & J. 357; *Locke's Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716; *Cockran v. Irlam*, 2 Manle & S. 301.

² *Saladin v. Mitchell*, 45 Ill. 79.

³ *Ingraham v. Whitmore*, 75 Ill. 24.

⁴ See *post* as to broker's compensation.

⁵ *Evans v. Waln*, 71 Pa. St. 69; *Hinckley v. Arey*, 27 Me. 362; *Coddington v. Goddard*, 16 Gray, 412.

⁶ *Tower v. O'Neil*, 66 Pa. St. 332; *Solomons v. Pender*, 34 L. J., N. S., 95.

⁷ *Wood v. Hayes*, 15 Gray, 375.

⁸ *Pickering v. Demeritt*, 100 Mass. 416.

⁹ *Bank of the State v. Bugbee*, 1 Abb. App. 86.

¹⁰ *Wilkinson v. Churchill*, 114 Mass. 164.

rules of the board of trade, for future deliveries of pork and lard for his principal, and then cancels the contract without authority, he cannot retain the margins advanced.¹ A broker cannot sell out cotton before the maturity of his principal's contract, merely because the latter does not comply with a demand for more margin, and recover from the principal for the loss sustained by the sale; at least, in the absence of proof of knowledge on the principal's part of a custom so authorizing.²

ILLUSTRATIONS. — A broker makes a contract for A to sell and deliver to B a certain quantity of wheat, at any time, during a year named, which A may select, at a fixed price, and agrees that if, by a rise in the price of wheat, more margin shall be required, he will not sell the wheat, but will draw upon A for such an amount as is necessary to carry the wheat. *Held*, that the broker has no right to close the contract without drawing upon A, although A at the time is out of the state, and has made no provision for the payment of the draft, of which fact the broker has knowledge: *Foote v. Smith*, 136 Mass. 92.

§ 225. **Broker's Authority a Limited One—His Duties and Liabilities.** — A broker, from the very nature of his employment, has only a limited authority. When he applies to a vendor to negotiate a sale, he is not his agent. He does not become so until the vendor enters into the agreement of sale. It is from this agreement that he derives his authority, and it must necessarily be limited by its terms and conditions. He is then the special agent of the vendor to act in conformity with the contract to which his principal has agreed, but no further, and he cannot be regarded as his agent, unless he complies with the terms of his special authority as derived from the contract. In short, a broker is authorized to sign only that contract into which the vendor has entered, not another and different contract. If he omits to include in the memorandum special exceptions and conditions to

¹ *Higgins v. McCrea*, 23 Fed. Rep. 782.

² *Blakemore v. Heyman*, 23 Fed. Rep. 643.

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the bargain, he signs a contract which he has no authority to make, and the party relying upon it must fail, because it is shown that the broker was not the agent of the vendor to make the contract.¹ The principal may give the agent a more extensive power than that of a mere broker, and if he does, his acts will be enforced by the court.² He must obey his principal's orders.³ If the orders are ambiguous, he may adopt that construction which he *bona fide* believes to be the correct one.⁴ It is the duty of the broker to keep accounts of his dealings with his principal.⁵ A broker is a mere "go-between," and is not liable for a premium of insurance, unless he acts under a *del credere* commission.⁶ A contract for the purchase of stocks to be delivered within a specified time, made by a broker in pursuance of an order of a customer who deposits with the broker a part of the price of the stocks as a "margin," and who is to pay or receive any difference between the contract price and the market price of the stocks on the day the contract matures, if closed by the broker, is not illegal.⁷ When a stock-broker fills an order for the purchase of stocks, and his principal makes default, and he thereupon resells the stocks at a loss, it is necessary for him, in order that he may recover the amount of such loss from his principal, to show that the stock was actually purchased by himself, or by an agent under his direction, at its fair market price, on the day of purchase, and that he actually paid the purchase-money therefor; that he notified his principal of the purchase, and requested him to receive the stock and pay the

¹ Bigelow, C. J., in *Coddington v. Goddard*, 16 Gray, 436.

² *Rutenberg v. Main*, 47 Cal. 213.

³ *Nesbitt v. Helser*, 49 Mo. 383; *Clark v. Cumming*, 77 Ga. 64; 4 Am. St. Rep. 72. A broker purchasing grain for future delivery in his own name, for a customer, is bound to obey the latter's orders to sell, or to terminate the agency by transferring the

contract: *Cothram v. Ellis*, 107 Ill. 413.

⁴ *Ireland v. Livingston*, L. R. 5 H. L. Cas. 395; *Bessent v. Harris*, 63 N. C. 542.

⁵ *Clark v. Moody*, 17 Mass. 145; *Haas v. Damon*, 9 Iowa, 589.

⁶ *Touro v. Cassin*, 1 Nott & McC. 173; 9 Am. Dec. 680.

⁷ *Jones v. Ames*, 135 Mass. 431.

price paid for it with reasonable commissions; that at the time of this notice, he was in condition to deliver the stock, by having the stock or other proper *indicia* of title actually in hand, or in the hands of his agent; that, on the failure of the principal to receive the stock, he, after a reasonable time, and notice to that effect to the principal, directed it to be sold; and that it was sold by his agent, either at public sale in market overt, or at a sale publicly and fairly made at the stock exchange or a stock board, or a board of brokers where such stocks are usually sold, at a fair market value, on the day of sale.¹

ILLUSTRATIONS.—A manufacturer in the interior of Massachusetts gave an order to brokers in Boston: "Send me twenty-five bags saltpeter at your earliest convenience." The order could not be filled in Boston at that time, and the brokers bought the saltpeter in New York, directing it to be delivered there to a common carrier for transportation, consigned to themselves to a town near the factory, and advised their employer of what they had done by a letter, to which he made no reply. They had bought like merchandise for him before on similar orders, but always in Boston, and had forwarded it to him from Boston. But the merchant from whom they bought the saltpeter had no knowledge of this course of dealing. He delivered it to the carrier as he was directed, and it was lost in course of transportation. On being advised of the loss, the manufacturer denied the brokers' authority to make the purchase in New York. *Held*, that the merchant might recover from the manufacturer the price of the saltpeter: *Foster v. Rockwell*, 104 Mass. 167. During the war of 1861-1865, the plaintiff requested a broker, who had funds in his hands belonging to plaintiff, to invest in certain bonds. A small amount was invested, when the bonds began to advance in price with great rapidity, and the broker did not invest the balance. He wrote to the plaintiff frequently, asking instructions, but received no reply. The money, which was confederate treasury notes, remained in the broker's hands until, at the close of the war, it became worthless. *Held*, that he was not liable to plaintiff for the loss: *Bernard v. Maury*, 20 Gratt. 434. A employed a broker to purchase certain shares of stock upon a margin, and to carry them for him. The broker reported that he had made the purchase. On a decline in value, A instructed the broker to sell the shares; the broker afterwards

¹ *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125.

reported that he had done so, and A paid him the difference between the purchase price and the sale price, together with interest and commissions. *Held*, that if no purchase or sale was in fact made, and the broker simply assumed the contract himself, A was entitled to recover from the broker the money paid him, unless he made the payment with knowledge of the facts: *Todd v. Bishop*, 136 Mass. 386. The owner of land employs a broker to sell it, and the broker employs an agent in the place where the land is, and the broker honestly believes an offer made by the agent to be a good one, and so states to the owner, who accepts the offer in reliance on what is told him. *Held*, that the broker is not liable if the offer turns out to be a poor one, he having used reasonable care in the matter: *Barnard v. Coffin*, 138 Mass. 37.

§ 226. Broker's Compensation.—A broker's compensation in a particular case is ascertained by the amount usually paid brokers for such services.¹ To entitle the broker to his commission on the sale of property, he must show an employment.² A real estate broker cannot claim compensation for introducing vendor and vendee, unless his character was known at the time.³ He is not entitled to his commission for the purchase of an estate until a contract for the purchase, binding upon all parties, is executed, or until the title is actually transferred.⁴ If he undertakes to find a purchaser for some town lots within a "short time," he becomes entitled to commissions if he finds a purchaser in two weeks, although during the time the price enhances, the broker not having been notified by his principal of a withdrawal or of a change of terms.⁵

¹ *Ruckman v. Bergholz*, 38 N. J. L. 531; *Sinclair v. Galland*, 8 Daly, 508; *Glenn v. Salter*, 50 Ga. 170.

² *Sussdorf v. Schmidt*, 55 N. Y. 320; *Pierce v. Thomas*, 4 E. D. Smith, 354; *Goodspeed v. Robinson*, 1 Hilt. 423; *Keys v. Johnson*, 68 Pa. St. 42; *Harper v. Goodall*, 10 Abb. N. C. 161; 62 How. Pr. 288; *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269; *Earp v. Cummins*, 54 Pa. St. 394; 93 Am. Dec. 718; *Jarvis v. Schaefer*, 105 N. Y. 280. Leaving with the broker a description of the property, with a request to sell on certain terms, is a

sufficient contract of employment: *Long v. Herr*, 10 Col. 380. "Commission" means a compensation for services in making a sale: *Wooley v. Jones*, 84 Ala. 88.

³ *Keener v. Harrod*, 2 Md. 63; 56 Am. Dec. 700. Merely putting a purchaser on the track of property is not equivalent to presenting him to the seller so as to entitle the broker to commissions: *Sievers v. Griffin*, 14 Ill. App. 63.

⁴ *Kerfoot v. Steele*, 113 Ill. 610.

⁵ *Smith v. Fairchild*, 7 Col. 510.

It is sufficient that the sale or contract was made through his efforts or agency,¹ even though the owner negotiates it himself.² "His commission is earned by finding a sufficient purchaser, ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and having introduced such a one to the owner as a purchaser, he is not deprived of his right to commission by the owner negotiating the contract himself."³ A real estate broker may recover his commissions if he first brings the property to the purchaser's notice, though he does not conduct the negotiation.⁴ So where two brokers are employed, the one who brings the minds of the parties together is entitled to commissions, though the other may have assisted or actually negotiated the sale.⁵ Where two brokers are employed separately, and each calls the attention of the same purchaser to the property, only the one who afterwards succeeds in effecting the sale is entitled to commissions.⁶ An agent who is promised a commission for finding a purchaser does not lose his right to it because another agent meanwhile effects a sale.⁷ If an agent or broker is the means of bringing the parties together, although the offer which is accepted be made by the purchaser to the principal in person, and the agent

¹ *Sussdorf v. Schmidt*, 55 N. Y. 321; *Lloyd v. Matthews*, 51 N. Y. 124; *Jacobs v. Kolff*, 2 Hilt. 133; *Thornal v. Pitt*, 58 N. Y. 683; *Veazie v. Parker*, 72 Me. 443.

² *Sussdorf v. Schmidt*, 55 N. Y. 321; *Martin v. Silliman*, 53 N. Y. 615; *Bash v. Hill*, 62 Ill. 216; *Morgan v. Mason*, 4 E. D. Smith, 636; *Chilton v. Butler*, 1 E. D. Smith, 150; *Tyler v. Parr*, 52 Mo. 249.

³ *McClave v. Paine*, 49 N. Y. 561; 10 Am. Rep. 431; *Timberman v. Craddock*, 70 Mo. 638; *Cavender v. Waddingham*, 2 Mo. App. 551; *Grant v. Hardy*, 33 Wis. 668; *Lane v. Albright*, 49 Ind. 275; *Short v. Millard*, 68 Ill. 292; *Leete v. Norton*, 43 Conn. 219; *Arrington v. Cary*, 5 Baxt. 609; *Haines v. Bequer*, 9 Phila. 51; *Hinds*

v. Henry, 36 N. J. L. 323; *Redfield v. Tegg*, 38 N. Y. 212; *Bell v. Kaiser*, 50 Mo. 150; *Lyon v. Mitchell*, 36 N. Y. 235; *Barnard v. Monnot*, 3 Keyes, 203; *Moses v. Bierling*, 31 N. Y. 462; *Jones v. Adler*, 34 Md. 440; *Durkee v. Vermont Cent. R. R. Co.*, 29 Vt. 127; *Watson v. Brooks*, 8 Saw. 316; *Harrell v. Zimpleman*, 66 Tex. 292; *Hanna v. Collins*, 69 Iowa, 51; *Wilson v. Sturgis*, 71 Cal. 226; *Buckingham v. Harris*, 10 Col. 445; *Williams v. Leslie*, 111 Ind. 70.

⁴ *Royster v. Mageveney*, 9 Lea, 148.

⁵ *Smith v. McGovern*, 65 N. Y. 574; *Winans v. Jaques*, 10 Daly, 487.

⁶ *Dreyer v. Rauch*, 42 How. Pr. 22; *Maracella v. Odell*, 3 Daly, 123.

⁷ *Fox v. Rouse*, 47 Mich. 558.

afterwards draws the writings and receives the purchase-money, he is entitled to his commissions.¹ Where a person desiring a loan makes an application in writing, upon which is an indorsement authorizing a single broker to procure the loan, and the broker leaves copies of such application with a number of persons, one of whom, induced by such application, without the broker's knowledge, lends the money, the broker is entitled to his commissions.² Where the owner of real estate employs several brokers to effect a sale, he is bound to pay the one who does in fact effect the sale, and cannot exercise his option.³ Where a single broker is employed to sell real property, through whom a buyer is introduced, which is followed by a negotiation resulting in a sale, the owner and buyer cannot, by any arrangement between them, disappoint the claim of such agent for remuneration. But where several brokers are openly employed, the entire duty of the seller is performed by remaining neutral between them, and he has the right to make the sale to a buyer produced by any of them, without being called upon to decide between these several agents as to which of them was the primary cause of the purchase.⁴ A real estate broker cannot recover commissions where he reports an offer for property to his principal, without stating who makes it, and the same property is afterwards sold to another broker, to whom a commission is paid, for the same price and to the same purchaser, unless it appears in evidence that the seller knew who the purchaser was, and of the sale to him, or that notice of these facts was given him by the plaintiff before the completion of the contract with and payment of commission, to the second broker.⁵ In general, if a broker introduces a purchaser, and such introduction is the foundation upon

¹ *Shepherd v. Hedden*, 29 N. J. L. 334.

⁴ *Vreeland v. Vetterlein*, 33 N. J. L.

² *Derrickson v. Quimby*, 43 N. J. L. 249.

³ *Tinges v. Moale*, 25 Md. 480; 90

⁵ *Eggleston v. Austin*, 27 Kan. 245. Am. Dec. 73.

which the negotiations are conducted and the sale made, the broker will be entitled to his commissions. If, however, by special contract the broker is not to receive any compensation unless the property is sold at a stated price, he is not entitled to commissions unless the property is sold at that price, or unless he introduces a purchaser who is willing to buy, and was prevented from making the sale by the fault of the principal.¹ If a real estate broker communicate information regarding property in his hands to one who reports it to a friend, who subsequently purchases it from the owner directly, the broker must be regarded as the procuring cause of the sale, and therefore entitled to his commission, even though he may have had no personal intercourse or dealing with the purchaser.²

The owner is not liable to commissions to the broker (in the absence of a special contract), though he tries to get a purchaser, if he nevertheless fails.³ A person may employ a broker, and then independently of him and without his assistance effect a sale. The broker in such case will not be entitled to commissions.⁴ But his com-

¹ *Schwartz v. Yearly*, 31 Md. 270.

² *Lincoln v. McClatchie*, 36 Conn. 136.

³ *Sussdorf v. Schmidt*, 55 N. Y. 321; *McClave v. Paine*, 49 N. Y. 561; 10 Am. Rep. 431; *Tombs v. Alexander*, 101 Mass. 255; 3 Am. Rep. 350; *Gottschalk v. Jennings*, 1 La. Ann. 5; 45 Am. Dec. 70, where it is said: "The general rule of law as to commissions is, that the whole service or duty must be performed before the right to any commission attaches; for an agent must complete the thing required of him before he is entitled to charge for it": *Kimberly v. Lupton*, 29 Md. 512; *Richards v. Jackson*, 31 Md. 250; 1 Am. Rep. 49; *Walker v. Tirrel*, 101 Mass. 257; 3 Am. Rep. 352; *Earp v. Cummins*, 54 Pa. St. 394; 93 Am. Dec. 718. A broker is not entitled to commissions where he affects a mere parol contract for the sale of land which is repudiated without the vendor's fault before being reduced to writing: *Gilchrist v. Martin*, 86 Tenn. 583.

⁴ *McClave v. Paine*, 49 N. Y. 561; 10 Am. Rep. 431; *Hungerford v. Hicks*, 39 Conn. 259; *Wylie v. Marine Mut. Bank*, 61 N. Y. 415; *Chandler v. Sutton*, 5 Daly, 112; *Bennett v. Kidder*, 5 Daly, 512; *Lane v. Albright*, 49 Ind. 275; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Schwartz v. Yearly*, 31 Md. 270; *White v. Twitchings*, 26 Hun, 503; *Stewart v. Murray*, 92 Ind. 543; 47 Am. Rep. 167; *Dolan v. Scanlan*, 57 Cal. 261; *Darrow v. Harlow*, 21 Wis. 302; 94 Am. Dec. 541. When a broker opens negotiations, but failing to bring the customer to terms abandons them, and the owner afterwards sells the property to the same customer, the broker cannot claim commissions: *Lipe v. Ludwick*, 14 Ill. App. 372. One who has put land into a broker's hands to sell may sell it himself without necessarily making himself liable to the broker for commissions, if the broker had nothing to do with the sale so made: *Doonan v. Ives*, 73 Ga. 205. A broker's commis-

mission is earned if he produce a purchaser ready and willing to take the property on the terms fixed by his principal, although through the latter's act no sale is completed.¹ And it is not affected by a change made in the contract as to the terms of payment between the buyer and seller.² So, if he find a purchaser who enters into a binding contract with the principal, but afterwards refuses to carry it out.³ So if the broker is unable to complete the bargain, through the principal taking it out of his

sions are not defeated by the failure of the purchaser to perform his contract, nor by the failure of the vendor to compel him to do so: *Parker v. Walker*, 86 Tenn. 566.

¹ *Mooney v. Elder*, 56 N. Y. 240; *Doty v. Miller*, 43 Barb. 529; *Coleman v. Meade*, 13 Bush, 358 (see *Rockwell v. Newton*, 44 Conn. 333); *Pearson v. Mason*, 120 Mass. 53; *Love v. Miller*, 53 Ind. 294; 21 Am. Rep. 192; *Lara v. Hill*, 15 Com. B., N. S., 45; *Lockwood v. Levick*, 8 Com. B. 603; *Stewart v. Mather*, 32 Wis. 344; *Bailey v. Chapman*, 41 Mo. 536; *Journey v. Tallman*, 40 N. Y. Sup. Ct. 436; *Hart v. Hoffman*, 44 How. Pr. 168; *Hague v. O'Connor*, 41 How. Pr. 287; *Glentworth v. Luthen*, 21 Barb. 145; *Beebe v. Ranger*, 35 N. Y. Sup. Ct. 452; *Bach v. Emerich*, 35 N. Y. Sup. Ct. 548; *McGavock v. Woodlief*, 20 How. 221; *Holly v. Gosling*, 3 E. D. Smith, 262; *Van Lien v. Byrnes*, 1 Hilt. 134; *Moses v. Bierling*, 31 N. Y. 462; *Phelan v. Gardner*, 43 Cal. 306; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Finnerty v. Fritz*, 5 Col. 174; *Fischer v. Bell*, 91 Ind. 243; *Fisk v. Henarie*, 13 Or. 156. "Where the vendor is satisfied with the terms made by himself, through the broker to the purchaser, and no valid objection can be stated in any form to the contract, it would seem to be clear that the commission of the agent was due and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent, by refusing to pay him when he had done all he was bound to do. The agent might well undertake to procure the purchaser, but this

being done, his labors and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an express understanding that the vendor was to pay nothing, unless he should choose to make the sale": *Kock v. Emmerling*, 22 How. 69, per Mr. Justice McLean; *Gottschalk v. Jennings*, 1 La. Ann. 5; 45 Am. Dec. 70; *Vinton v. Baldwin*, 88 Ind. 104; 45 Am. Rep. 447. "The owner of land who has agreed to pay a broker commissions for finding a purchaser cannot escape liability by giving the land to a son pending the trade, it being finally consummated by the son under his father's direction: *Fox v. Byrnes*, 52 N. Y. Sup. Ct. 150.

² *Lawrence v. Atwood*, 1 Ill. App. 217; *Bash v. Hill*, 62 Ill. 216; *Green v. Read*, 3 Fost. & F. 226; *Reynolds v. Tompkins*, 23 W. Va. 229; *Gorman v. Scholle*, 13 Daly, 511.

³ "When the broker has effected a bargain and sale by a contract which is mutually obligatory on the vendor and vendee, he is entitled to his commission, whether his employer chooses to comply with or enforce the contract or not": *Love v. Miller*, 53 Ind. 294; 21 Am. Rep. 192. If the owner of land agrees to pay a broker a commission, not for finding a purchaser alone, but for making an actual sale, the broker cannot claim his commission until the sale is made: *Hyams v. Miller*, 71 Ga. 608; nor on a contract of sale which, because of its incompleteness, cannot be enforced: *Bradford v. Menard*, 35 Minn. 197.

hands, he is entitled to a *pro rata* commission for the work he has done.¹ A broker employed to sell goods to arrive becomes entitled to his commission by negotiating a contract for the purchase of the goods, notwithstanding the sale is never consummated by reason of the non-arrival of the goods. He is not bound to show a special custom existing, which would entitle him to brokerage under such circumstances. He is entitled to his compensation, because he has done all he agreed to do.² The purchaser obtained by the broker must, however, be such a one as the vendor is bound to accept,³ and who is ready to accede to the principal's terms;⁴ nor can the broker recover where the transaction is illegal.⁵ A broker for the sale of personal property cannot recover commissions until the sale is completed.⁶ Defects in the vendor's title are irrelevant;⁷ the broker is entitled to his commissions, though the purchaser is relieved from his purchase by the court on account of a defect of title;⁸ or the vendor cannot make a perfect title.⁹

The broker must act only for his employer, and if he is employed by both, without the knowledge of either, he

¹ Martin v. Silliman, 53 N. Y. 615; Prickett v. Badger, 1 Com. B., N. S., 296; Durkee v. Vermont Cent. R. R. Co., 29 Vt. 127; Chapin v. Bridges, 116 Mass. 105; Turner v. Webster, 24 Kan. 38; 36 Am. Rep. 251. One employed to find a customer for land does not lose his right to a commission because his principal refuses to consummate the contract: Goss v. Stevens, 32 Minn. 472.

² Paulsen v. Dallett, 2 Daly, 40.

³ Coleman v. Meade, 13 Bush, 358.

⁴ Fraser v. Wyckoff, 63 N. Y. 445; Barnard v. Monnot, 3 Keyes, 233; McGavock v. Woodlief, 20 How. 221; Darrow v. Harlow, 21 Wis. 302; 94 Am. Dec. 541; Hayden v. Grillo, 26 Mo. App. 289; Cassady v. Seeley, 69 Iowa, 509; Fisk v. Henarie, 13 Or. 156. But he does not lose his right to his commission merely because the principals cannot be brought to terms on a particular point, if they come

to a general agreement: Wyckoff v. Bliss, 12 Daly, 324. One who is promised compensation if he will procure a purchaser for property on certain terms cannot claim compensation for effecting a sale on lower terms, he having, moreover, acted in part in the buyer's interest: Williams v. McGraw, 52 Mich. 480.

⁵ Augusta Bank v. Cunningham, 75 Ga. 366. A broker who knowingly acts for parties who make mere bets or wagers on the future state of the market cannot recover his losses in such transactions: McLean v. Stuve, 15 Mo. App. 317.

⁶ Thomas v. Lincoln, 71 Ind. 41.

⁷ Allen v. James, 7 Daly, 13.

⁸ Smith v. Mooney, 14 Week. Dig. 237; Doty v. Miller, 43 Barb. 529.

⁹ Knapp v. Wallace, 41 N. Y. 477; Holly v. Gosling, 3 E. D. Smith, 263; Gonzales v. Broad, 57 Cal. 224; Hamlin v. Schulte, 34 Minn. 534.

has undertaken an inconsistent employment, and can recover commissions for his services from neither,¹ unless he is a mere middle-man to bring them together;² or his double employment was known and assented to by both parties.³ The intentional concealment from his principal, by a broker employed to sell real estate, of important and

¹ *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Scribner v. Collar*, 40 Mich. 375; 29 Am. Rep. 541; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Fairbrother v. Simmons*, 5 Barn. & Ald. 333; *Siegel v. Gould*, 7 Lans. 177; *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168; *Coleman v. Garriques*, 18 Barb. 60; *Glentworth v. Luther*, 21 Barb. 145; *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Bennett v. Kidder*, 5 Daly, 512; *Ball v. McConnell*, 37 Ohio St. 400; 41 Am. Rep. 529; *Meyer v. Hanchett*, 30 Wis. 423. In *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 753, the rule is thus stated: "The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is entrusted to him to sell is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as

a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound in the exercise of good faith to disclose to them."

² *Rupp v. Sampson*, 16 Gray, 401; 77 Am. Dec. 416, where it was said: "The interests of buyer and seller are necessarily adverse, and it would operate as a surprise on the confidence of both parties, and essentially affect their respective interests, if one person should, without their knowledge, act as the agent of both. But the plaintiff did not act in any such capacity. He was not an agent to buy or sell, but only acted as a middle-man to bring the parties together in order to enable them to make their own contracts. He stood entirely indifferent between them, and held no such relation in consequence of his agency as to render his action adverse to the interests of either party": *Fritz v. Finnerty*, 14 Am. Law Rev. 598; *Siegel v. Gould*, 7 Lans. 177; *Balheimer v. Reichardt*, 55 How. Pr. 414; *Herman v. Martineau*, 1 Wis. 151; 60 Am. Dec. 368; *Stewart v. Mather*, 32 Wis. 355.

³ *Rowe v. Stevens*, 53 N. Y. 621; 35 N. Y. Sup. Ct. 189; *Siegel v. Gould*, 7 Lans. 177; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 529.

material facts, will deprive him of his right to a commission, and this although there was no fraudulent purpose.¹ An agreement by a person desiring to purchase land, to convey a part of it to the seller's broker, cannot be enforced by the broker, one of the considerations of the agreement being that he would put such person in communication with the seller.² The fact that the agent had taken out no license under the internal revenue laws of the United States will not affect his right to recover.³

ILLUSTRATIONS. — BROKERS' CLAIMS TO COMMISSIONS SUS-TAINED. — A person seeing by a card on a house that it was for sale went to the agent and got an order to examine the place, but concluded the price was too high. He had no further communications with the agent, but subsequently renewed negotiations with a friend of the owner, and purchased at a less price. *Held*, that there was evidence that the purchase was made through the agent's intervention, and that he was entitled to commissions: *Mansell v. Clements*, L. R. 9 C. P. 139. Defendants purchased certain real estate through the instrumentality of plaintiff, who acted as broker for the seller. He claimed commissions, which they declined to pay, but promised him part of the profits when they sold. He advised as to the best mode of sale, procured maps of the property, which he displayed, also signs, and advertised it. A purchaser, attracted by the advertisements and signs, opened negotiations with defendants, who notified the plaintiff to do nothing further, and that they would pay him a commission if the sale was effected. The sale was effected. *Held*, that plaintiff was entitled to commissions: *Sussdorf v. Schmidt*, 55 N. Y. 321. A broker had been employed to procure a loan; he found a party with the money ready, who consented to loan upon approval of the security proposed. Such lender, on examination, found the property encumbered, and refused to consummate the transaction. *Held*, that the broker was entitled to his commissions: *Holly v. Gosling*, 3 E. D. Smith, 262. A agreed to pay B a certain sum to find him a tenant for his farm. C agreed with the same B to pay him a certain sum to find a farm, which he, C, could hire, and by the mediation of B, A and C were brought together, and consummated a bargain for the letting and hiring of a farm. *Held*, that the fact that B had acted for C as well as A in the transaction constituted no bar to a

¹ *Pratt v. Patterson*, 12 Phila. 460.

² *Ruckman v. Bergholz*, 37 N. J. L.

³ *Smith v. Townsend*, 109 Mass. 500. 437.

recovery by B of the amount agreed to be paid by A: *Herman v. Martineau*, 1 Wis. 151; 60 Am. Dec. 368. A agreed with B that if B would find anybody that would trade with A for certain land owned by him, he would pay B five hundred dollars. B accordingly introduced to A a person with whom A made a written agreement for the sale of the property. *Held*, that upon the execution of this agreement B became entitled to his commission, though the sale was never completed: *Pearson v. Mason*, 120 Mass. 53. By the terms of a contract, a broker was to receive ten per cent of the price if he should dispose of certain steamers at prices and conditions to be agreed on. His action in the matter directed the attention of the purchasers to the vessels he had for sale, and led to the negotiations which resulted in the purchase of the vessel, but he did not actually make the sale and transfer. *Held*, that he was entitled to his commission: *Lyon v. Mitchell*, 36 N. Y. 235; 93 Am. Dec. 502. A land agent advertised a farm at his own expense, and a neighbor, seeing the advertisement, directed a buyer to the farm. *Held*, that the sale was really secured by the agent: *Anderson v. Cox*, 16 Neb. 10. A broker was employed to surrender stock and interest scrip, and procure bonds for them, and in so doing expended time and money. *Held*, that it was to be presumed, from the fact of the employment, that the bonds were more valuable to the owner than the stock: *Chappell v. Cady*, 10 Wis. 111. A agreed to pay to B, a real estate broker, a certain sum to sell his mine for a certain price within a certain time. B found a man willing and ready to purchase, but A refused to sign an agreement of sale required by the purchaser, whereupon the purchaser withdrew. *Held*, that A's refusal to sign the agreement was equivalent to a refusal to sell, and that B was entitled to his commission: *Neilson v. Lee*, 60 Cal. 555. An agent employed to "find a purchaser" for land found one who said he would take the land, but the principal had then sold to another. *Held*, that the agent, in order to recover for his services, must show that his purchaser was financially responsible: *Iselin v. Griffith*, 62 Iowa, 668. A gives B until a certain time to "close out" A's land, or to find a customer, offering him a certain sum if he performs the service. B may recover the compensation if he produces the customer before that date, although not in time for the preparation of the papers and completion of the sale before the date named: *O'Connor v. Semple*, 57 Wis. 243. A real estate broker, having contracted with the owner of a farm to sell it at a specified commission, procured a buyer and brought him to the farm. The latter objecting to the quantity of land offered, the owner agreed to reserve a portion and sell him only the remainder, whereupon

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the parties repaired to the office of the broker, who drew up the papers, and did other things in aid of the vendor, and the sale was consummated. *Held*, that the broker was entitled to his commissions on the land actually sold: *Woods v. Stephens*, 46 Mo. 555. In an action to recover a commission on the sale of a house to the defendant, there was evidence that the plaintiff, who was not a real estate broker, said to the defendant, who was seeking a house, "If I find you a house, you must pay me a commission," and the defendant replied, "I would as soon pay you as any other person"; that the plaintiff did not see the defendant again, but that, in consequence of information furnished by the plaintiff, a third person called on the defendant and sold him a house. *Held*, that this evidence would support a verdict for the plaintiff, although the usage of brokers is, that, in the absence of special agreement, the seller, and not the purchaser, pays the commission, and although the plaintiff had not taken out an internal revenue license from the United States as a real estate agent: *Pope v. Beals*, 108 Mass. 561. A employed B to find purchasers for a certain number of shares of stock at a price named, and agreed to pay him a commission of a certain per cent on the sale. B negotiated with C for the purchase of the stock, and D was subsequently consulted with by C, and later by B, as to joining in the purchase. D suggested E as an associate, and afterwards called his attention to the matter. While these negotiations for a sale were pending, A informed B that he had sold the stock to other persons, and could not sell to C and his associates; but afterwards, at the request of B and C, A transferred the shares to C, D, and E, as a sale in one "block," and at a lower price than that originally fixed by him, though B had nothing to do with such reduction in price. *Held*, in an action by B against A, that B was entitled to recover a commission on the shares so sold: *Dexter v. Campbell*, 137 Mass. 198. A bond was given by A to convey a lot of land at a price named per square foot. The bond was assigned to B, who employed C to find a purchaser for the land, agreeing to pay him all he could get over the price named in the bond. C sold the land at a higher price to D, to whom A, at the request of B, conveyed the land. In a suit brought by C against B to recover the excess over the price named in the bond, B offered to show that C, at the time of his employment as agent, was interested in the land as owner or part-owner, and did not disclose this fact to him, and contended that this concealment was a fraud upon him. *Held*, that the question of such ownership was immaterial: *Durgin v. Somers*, 117 Mass. 55. A, a real estate agent, was applied to by B, an owner of land, to sell it for him. B gave to A a written description of

the land, and stated the price at two thousand and fifty dollars, fifty dollars of which sum was to be the perquisite of A for effecting a sale. C obtained from the agent a copy of the description, called on B, and asked him what he would take for the land. B replied two thousand dollars, which C gave, and received a conveyance. *Held*, that the owner was responsible to the agent for the perquisite of fifty dollars: *Alexander v. Breeden*, 14 B. Mon. 125. A employed B, a broker, to sell certain property. B communicated to him the name of C, who offered to purchase, but at a price less than A asked. A rejected the offer, and discharged the broker, but shortly after, through another agent, sold the property to C for the price originally offered by C. *Held*, that B was entitled to his compensation as broker: *Gottschalk v. Jennings*, 1 La. Ann. 5; 45 Am. Dec. 70. W. employed C. to purchase a lot for him upon certain terms, stipulating that the compensation of the latter was to be deducted from the purchase-money going to the vendor, and was in no event to be paid by W. *Held*, that W. would be liable, nevertheless, to C for his proper fee, in case of a violation of the contract by W. in refusing to take the property: *Cavender v. Waddingham*, 2 Mo. App. 551.

ILLUSTRATIONS (CONTINUED).—BROKERS' CLAIMS NOT SUSTAINED.—A agreed to pay B fifteen hundred dollars, provided he effected a sale, or obtained a customer who would pay seventeen thousand five hundred dollars for the unsold territory of certain patents, and ten per cent on any less sum which A might agree to take. B procured H. & S. to enter into a partnership agreement with A for the selling of the patent rights, the firm agreeing to pay A fifteen thousand dollars for his interest out of the profits of the concern. *Held*, that B could not recover, as he had not procured any absolute purchaser: *Fraser v. Wyckoff*, 63 N. Y. 445. A broker employed by A to sell his house effects a trade by which A's house is bought by B, who sells his house to C, the purchase price being dependent in each case on each other, and the purchase-money of C, which is the same as that of B, is paid directly to A, who pays the broker a commission for selling his house. *Held*, that he cannot recover likewise of C, even though he was employed by C to buy a house for him: *Follansbee v. O'Reilly*, 135 Mass. 80. A person employed a broker to find a purchaser for certain land, promising that if he found one within a month able and willing to buy at a certain figure he would pay the broker a certain sum. The broker found a purchaser within the month, but before they found him the principal revoked the agency: *Held*, that the broker could not recover: *Brown v.*

Pfoor, 38 Cal. 550. The defendant, being owner of three parcels of land, employed plaintiff, a real estate broker, to negotiate sales thereof at a specified price for each. Plaintiff found a purchaser for one, and the sale was effected, upon which plaintiff received his commission. Subsequently defendant informed the purchaser of his desire to sell one of the other parcels, and a contract was made between them, plaintiff taking no part in this affair. *Held*, that he was not entitled to a commission on the sale: *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431. H., a real estate agent, having heard that K. desired to sell certain property, went to the office of K. and told him that in case he should succeed in negotiating a sale, he should expect the usual commission of two and a half per cent. Afterwards H. brought K. and J. together, and certain papers were executed, whereby they contracted for the sale of the property, with a stipulation that if either party should fail to comply with the contract, a forfeiture of one thousand dollars should be paid by the party in default. Afterwards J., having failed to comply with the contract, gave his note for the forfeit money. *Held*, that H. was not entitled to any commissions: *Kimberly v. Henderson*, 29 Md. 512. An agreement to sell real estate on commission was made by a broker with an owner. On a day fixed the broker stated that he could do nothing with the lots, but subsequently informed another broker that the property was for sale, and through the latter a sale was effected. *Held*, that the employment was at an end, when the information of inability to procure a purchaser was given: *Holley v. Townsend*, 2 Hilt. 34. An agent agreed to sell a farm for two per cent commission on a certain amount, and thirty per cent on all received in excess of that amount. *Held*, that he was not entitled to commission on the value of part of the crop, which he knew belonged to another, and which was deducted from the gross amount received: *Parrett v. Johnson*, 64 Pa. St. 223. An action is brought by a broker for services in procuring a purchaser for a lot of land at a certain price. *Held*, that evidence that he found a purchaser who agreed to take the land at a price, provided that the defendant would then lease the same for three years and give security for the rent, and that an agreement was drawn up to that effect and signed by the defendant, but that the purchaser refused to sign unless the defendant would first take a lease and give security, failed to show that he procured a purchaser who agreed to buy at any price: *Masten v. Griffing*, 33 Cal. 111. Plaintiff, a real estate broker, without any express contract of employment with defendant, introduced to him a person who purchased of him a piece of land. Plaintiff was present during the negotiation between the

parties, and spoke disparagingly of the value of the property, and suggested that the price asked was too large. He also was present with the parties at the consummation of the contract and the delivery of the deed. The sale was brought about by means of plaintiff, and but for him the parties would not have come together; but during the whole transaction defendant supposed plaintiff was acting as the agent of the purchaser, and never intended to employ him for himself. In an action to recover a commission on the sale, *held*, that no contract of employment was implied from the facts in the case, and that plaintiff was not entitled to recover: *Atwater v. Lockwood*, 39 Conn. 45. At the time of making the sale the seller told the broker who had negotiated the sale that he must get his commissions from the buyer, and there was no evidence that the seller ever employed the broker. *Held*, that the seller was not bound to pay the broker, as he had not employed him: *Goodspeed v. Robinson*, 1 Hilt. 423. A contracted with brokers to find a purchaser for his land, agreeing to give them as commission all that the land brought above one thousand dollars. Without their consent he sold it for twelve hundred dollars to a purchaser found by himself. *Held*, that they were not entitled to any commission: *Stewart v. Murray*, 92 Ind. 543; 47 Am. Rep. 167. A broker whom A employed to sell land for a commission, and advised of his title to it, and that he "could give a warranty deed of the same," introduced B as a person desirous of buying the land; and B then bargained with A for its purchase at a fixed price, but before completing a valid contract discovered a defect in A's title. A thereupon agreed with B to sell the land at public auction under a power by the due execution of which a valid title could be conveyed; and B agreed to buy it at the auction, but did not do so, and it was bought at the auction by C for a price larger than that fixed between A and B. *Held*, that A was not liable to the broker for commissions or services: *Tombs v. Alexander*, 101 Mass. 255; 3 Am. Rep. 349. A employed B, a broker, to sell a house. B procured of C an offer of five thousand dollars, which B advised A not to accept. A afterwards negotiated a sale thereof to C at five thousand three hundred dollars. *Held*, that B was not entitled to any commissions on the sale, A being the procuring cause: *White v. Twitchings*, 26 Hun, 503. D. employed several brokers in Baltimore to effect for him a loan of ten thousand dollars for three years at eight per cent, to be secured by a mortgage on certain real estate. One of these, G., discovered a person able and willing to make the loan, and notified D., who declined to accept, stating that he had already perfected a loan of that amount on the same prop-

erty, and at the same rate, for one year, through one of the other agents whom he had employed, and had paid him his full commissions. It was a usage among the brokers in Baltimore, that when two or more are employed to negotiate the same transaction, the broker who first succeeded in making such negotiation was entitled to full commissions, and the others were not entitled to any. *Held*, that G. was not entitled to recover any commissions: *Glenn v. Davidson*, 37 Md. 365. The defendant employed a broker to sell his country place, and the broker introduced R., who had a mine he proposed to exchange for it. The proposition was rejected. A year and a half after, R. bought the place of defendant as agent for his wife. *Held*, that defendant was not liable for commissions to the broker: *Harris v. Burtnett*, 2 Daly, 189. W., owning certain stock, offered to pay G. "a liberal commission" if G. would sell it, but named no price, and directed G. to inform him if any offer was received for it. G. procured an offer, but W. refused it, naming a higher price. G. then found another party, R., conversed with him about buying the stock, and advised W. to meet R. at a certain time and place therefor. W. met R., and sold him the stock at the higher price. *Held*, that proof of these facts would not support an action by G. against W. for the commission: *Gillespie v. Wilder*, 99 Mass. 170. The owners of real estate expressly refuse to employ the plaintiff, a broker, in selling their property. *Held*, that the mere fact that the plaintiff, having ascertained the price charged for the property, sent a purchaser, to whom a sale was effected, did not entitle him to recover commissions: *Pierce v. Thomas*, 4 E. D. Smith, 354. A broker not employed by the owner, the defendant, offered to sell to one whose attention had been attracted by the owner's advertisement, but the customer said he would see the owner; afterwards the broker was employed to sell, but the customer, without again seeing him, bought of the owner. *Held*, that the broker had earned no commission: *Cushman v. Gori*, 1 Hilt. 356. K. employed a broker to sell land. It was agreed that if K. should sell without the broker's assistance the latter should have nothing. After the broker had found a customer, K. reported that he had made a proposition to S., and was awaiting an answer. The broker agreed to wait. S. accepted K.'s proposition. *Held*, that the broker was not entitled to a commission: *Robinson v. Kindley*, 36 Kan. 157. A broker, hearing that a company was about to advertise for bids for piles, procured from each of several dealers in piles a promise that if he secured a sale he should have a commission, he offering, as an inducement, to act for each, and saying nothing about the company or the bidding. Bids

were advertised for, and one secured a contract. *Held*, that he owed the broker nothing: *Murray v. Beard*, 102 N. Y. 505. A broker got from a manufacturer an agreement to sell certain goods at prices to cover commissions. The transaction fell through, the broker's customer making default. *Held*, that the broker had no claim on the manufacturer for commissions: *Colwell v. Springfield Iron Co.*, 24 Fed. Rep. 631. Defendant employed plaintiff to sell the Old South Church property. Plaintiff talked with P. about buying it for his own purposes, but P. abandoned the idea. Afterwards, a society was formed for the purpose of preserving the property, and there not being money enough subscribed, it became necessary to get some responsible person to sign a mortgage note, and this P. did, taking a conveyance to himself, and then giving a note and mortgage, and making a declaration of trust. *Held*, that P. was not a purchaser so as to make defendant liable to plaintiff for commissions: *Viaux v. Old South Society*, 133 Mass. 1. A promises B a certain sum if he will produce a purchaser of A's property at a specified price. *Held*, that B cannot recover on such promise without producing a person able and willing to pay such price. The stipulation as to price is not waived by A's selling the property for a less price than a person produced by B, unless he does so with knowledge that such person is able and willing to pay the price stipulated in the contract between A and B: *McArthur v. Slauson*, 53 Wis. 41. A is employed as a broker to sell B's house, on the agreement that he will inform B if he sends a purchaser, and A and C then agree that if C will procure a purchaser, he shall share with A in the commission. C, on going to look at the house, tells B that no broker has anything to do with the trade, and a price is named on that understanding, and the house is bought by a purchaser procured by C. A and C are partners in the business of effecting a sale of B's house to such purchaser. *Held*, that C's fraud, though not participated in by A, will bar an action by A against B for the commission, prosecuted for the joint benefit and at the joint expense of A and C: *Thwing v. Clifford*, 136 Mass. 482. S. met R., a real estate broker, on the street, and upon inquiry by the latter in regard to a certain house owned by S., said that he would sell it so as to net himself twenty thousand dollars, and that if R. could sell it for twenty thousand five hundred dollars, he might have the five hundred dollars. Some months afterwards S. sold the property to G. for nineteen thousand five hundred dollars, who came from R., from whom he had learned the property was for sale. *Held*, that R. was not entitled to any commissions: *Rees v. Spruance*, 45 Ill. 308. A broker was appointed to sell land

on certain terms. He showed the land to a person who negotiated wholly with the owner, and bought on lower terms, the owner not knowing that the buyer had had any communication with the broker, and the owner, when the negotiations began, having notified the broker that his authority was suspended. *Held*, that the broker could not recover commissions: *Blodgett v. Railroad Co.*, 63 Iowa, 606. A agrees to give B a commission to effect a sale of A's land within a specified time, and on the last day B produces one who will buy if he can have a reasonable time to investigate the title, which time A refuses to allow, whereby the sale falls through. *Held*, that B cannot claim commissions, as time is of the essence of the contract: *Watson v. Brooks*, 11 Or. 271. Defendant agreed to pay plaintiffs a certain commission for selling his property at a certain price. H., the purchaser, refused, in the first place, to pay the required price, but afterwards instructed an agent to buy, and give the full price if he could not get it for less. The agent bought the property for less of another broker, plaintiffs having omitted to inform defendant that H. would pay the full price. *Held*, that plaintiffs did not act in good faith by such omission, and were not entitled to a commission for effecting a sale: *Henderson v. Vincent*, 84 Ala. 99.

§ 227. **Factors and Del Credere Agents.**—A factor is an agent for the sale of goods in his possession or consigned to him.¹ The distinction between a broker and a

¹ Wharton on Agency, sec. 735; Evans on Agency, 3; Story on Agency, sec. 33; *Burton v. Goodspeed*, 69 Ill. 237; *Whitfield v. Brand*, 16 Mees. & W. 288; *Edgerton v. Michels*, 66 Wis. 124. "The difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession, while a broker as such cannot ordinarily buy or sell in his own name, and has no possession of the goods sold. The plaintiffs made the sales themselves, in their own names, at their own store, and on commission, and had possession of the goods as soon as the sales were made, and delivered or shipped them to their customers. This course of business clearly constituted them commission merchants as contradistinguished from mere brokers or agents"; *Slack v. Tucker*, 23 Wall. 321. In *Ward v.*

Brandt, 11 Mart. (La.) 331, 13 Am. Dec. 352, it is said: "Factors are those who are appointed to transact a particular business in the name of another, and not in their own: *Curia Philippica, Comercio terrestre*, lib. 1, cap. 4, n. 1. Commission business is transacted in this city, not in the name of the principal, but in the name of the house to whom the property is transmitted for sale. They dispose of it as their own, take bills payable to themselves for the price, and when they purchase, it is they who state themselves buyers, not the house in Philadelphia, London, or Paris, who may have commissioned them. The different members of the sentence, taken together, convince us that the intention of the parties was to establish a commission house in this city of the ordinary kind. The expression 'as factors' does not prove anything else was contemplated; for the mean-

factor was early pointed out by the judges in the English case of *Baring v. Corrie*.¹ Here Chief Justice Abbott said: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation,—he is not trusted with the possession of the goods, and he ought not to sell in his own name." To the same effect Mr. Justice Holroyd observed in the same case, that a factor "is a person to whom goods are sent or consigned, and he has not only the possession, but, in consequence of its being usual to advance money upon them, he has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority, and it may be right, therefore, that the principal should be bound by the consequences of such sale,—amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound." An agent for collecting debts merely is not a factor within

ing attached to the word 'factor' in common parlance is quite consistent with the other terms of the sentence as we understand them. Our law defines merchants those persons who buy and sell merchandise to make profit by it: *Curia Philippica*, lib. 1, cap. 1, n. 3.

Commission merchants who have a house established in New Orleans, and who live by buying and selling those objects which form the commerce of this place, come within the letter of the definition just given."

¹ 2 Barn. & Ald. 143.

the Virginia statute of limitations.¹ Where a person employs another to sell goods and wares at a distant place, and agrees that the employee shall receive a certain sum yearly, and a stipulated portion of the profits for his services; and the employee is to select and rent a business house, and employ clerks, and conduct the business; and all rents and expenses are to be paid out of the proceeds if sufficient, but if not, then by the employer,—the person conducting the business is a factor.² A “commission merchant,” as the term is used in the Alabama revenue law, is synonymous with “factor,” and means one who receives goods, chattels, or merchandise for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner, or derived from the sale, etc., of the goods. One who “shipped cotton for different parties, or for about ten or twelve different persons, to a firm in Boston, and received a return commission on the cotton so shipped,” is only a shipping and forwarding agent, and cannot be said to be carrying on the business of a commission merchant.³

When, generally for an additional commission, he guarantees to his principal the payment of the buyer's debt, he is said to be a *del credere* agent.⁴ Whether a *del credere* agent is responsible to his principal in the first instance, or only as a guarantor, is a question upon which there is much conflict of opinion. Mr. Evans says he “is not responsible to his principal in the first instance, though a contrary opinion at one time prevailed.”⁵ And Judge Story⁶ treats him as “liable to the principal, if the buyer

¹ *Hopkirk v. Bell*, 4 Cranch, 164; 3 Cranch, 454.

² *Winne v. Hammond*, 37 Ill. 99.

³ *Perkins v. State*, 50 Ala. 154. As to the rights, duties, and liabilities of commission merchants, in cases depending upon peculiar and unusual circumstances, see *Ansley v. Anderson*, 35 Ga. 8; *Smith v. Faulkner*, 12 Gray, 251; *Valle v. Cerre*, 36 Mo. 575; 88 Am. Dec. 161; *Dodge v. Wilbur*, 10

N. Y. 579; 5 Sand. 397; *Field v. Syms*, 2 Robt. 35; *Johnson v. O'Hara*, 5 Leigh, 456.

⁴ *Story on Agency*, sec. 33; *In re Nevill*, L. R. 6 Ch. App. 397. See *Sharp v. Emmet*, 5 Whart. 288; 34 Am. Dec. 554.

⁵ *Citing Hornby v. Lacy*, 6 Maule & S. 166.

⁶ *Story on Agency*, sec. 33, citing *Thompson v. Perkins*, 3 Mason, 232.

fails to pay, or is incapable of paying; but he is not personally the debtor." But Mr. Freeman, in his note in 58 Am. Dec. 171, says: "The American cases, however, follow the early English decisions, and consider him as absolutely liable to pay the price when the credit has expired," which seems to be a better statement of the weight of authority.¹ A *del credere* commission is not demand-

¹ Wolff v. Koppel, 2 Denio, 368; 43 Am. Dec. 751; Cartwright v. Greene, 47 Barb. 9; Swan v. Nesmith, 7 Pick. 220; 19 Am. Dec. 282; Sherwood v. Stone, 14 N. Y. 267; Leverick v. Meigs, 1 Cow. 645; Blakely v. Jacobson, 9 Bosw. 140; Heubach v. Mollmann, 2 Duer, 227; Milliken v. Byerly, 6 How. Pr. 214. His agreement to guarantee may be proved by parol, not being within the statute of frauds: Swan v. Nesmith, *supra*; Sherwood v. Stone, *supra*. The American editor of Evans on Agency, page 3, cites Thompson v. Perkins, 3 Mason, 236, and Bradley v. Richardson, 23 Vt. 720, as supporting the modern English rule. The authorities are exhaustively reviewed in Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190, per Alvey, J., as follows: "Whenever an agent, in consideration of additional commission, such as was agreed to be allowed in this case, guarantees to his principal the payment of debts that become due through his agency, he is said to act under a *del credere* commission. What, then, is the nature and extent of this guaranty? In Grove v. Dubois, 1 Term Rep. 112, a case of a policy-broker, Lord Mansfield answered this question in very plain and unqualified terms when he said: 'It is an absolute engagement to the principal from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal, for his benefit, to resort to him as collateral security. But the broker is liable at all events.' In this Mr. Justice Buller concurred, and said that he had known many actions to have been brought against brokers with commission *del credere*, and that he had never heard

any inquiry made in such cases, whether there had been a previous demand upon the underwriter, and refusal; and he declared that such was not the practice, — thus showing, according to the opinions of these great judges, that the obligation of such undertaking was primary and absolute in its character, and that the agent was regarded as standing in the relation to his principal of an original debtor. Ten years after the case of Grove v. Dubois, the case of Mackenzie v. Scott, 6 Brown Parl. C. 283, occurred in the house of lords on an appeal from the court of sessions in Scotland. That case was very analogous in its circumstances to the one before us. There a factor, under a commission *del credere*, sold goods and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and received the banker's bill for the amount, payable to his (the factor's) own order, on a house in London. This banker's bill the factor indorsed and transmitted to his principal, who got the same accepted. The acceptors and drawer having failed before payment, it was held, according to the head-note of the case, that the factor was answerable for the amount of the bill, being personally liable, under his commission *del credere*, to satisfy his principal the price of the goods sold. It was insisted in that case, as it has been in this, that the *del credere* obligation extended only to guaranteeing the payment of the price of the goods by the vendee, and that the remittance of the money by the factor was a transaction entirely different and distinct. But if the uniform interpretation of that case be correct (there being no reasons assigned for the judgment given), the

able when the sale is made on credit, but is nevertheless paid for in cash in consideration of a deduction of a cer-

argument in that respect did not avail; and in view of the law as it had been announced in *Grove v. Dubois*, it is not difficult to perceive upon what ground that decision was based; and afterward, in 1803, the same general proposition was again pointedly asserted as the law of England, in the case of *Houghton v. Matthews*, 3 Bos. & P. 489. By these decisions; the law was regarded as settled in England, until about the year 1816; and all the text-writers and authors of elementary treatises upon the subject of commercial contracts before that time, laid it down as the unquestionable law that an agent, acting under a commission *del credere*, was bound to his principal in the first instance, and as an original debtor. The law will be found so stated by Livermore, in his work on Agency, 409, 410; Paley on Agency, 40; Comyn on Contracts, vol. 1, 253; and Chitty in his work on common law, vol. 3, 222. But it is said that the cases to which we have referred do not now announce the law as accepted in England, and we are referred to the case of *Morris v. Cleasby*, 4 Maule & S. 563, decided in 1816, and the cases following on its authority, to show how the rule has been qualified, if not entirely changed. It is true, in the case of *Morris v. Cleasby*, Lord Ellenborough did express a decided dissent from the principle announced in the previous decisions, both as to the nature and scope of the *del credere* obligation. He said that the guarantor, in consideration of the commission, is only to answer for the solvency of the vendee, and to pay the money if the vendee does not; and that, on the failure of the vendee, the agent is to stand in his place and make his default good, thus clearly placing the agent in the position of mere surety to the purchaser of the goods. And if such be the true nature and character of the contract, seeing that it is entirely collateral and secondary, it is difficult to perceive how it can escape the operation of the statute of frauds. Be that, however, as it may, the de-

cision of Lord Ellenborough was sanctioned by the case of *Peole v. Northcote*, 7 Taunt. 473, and also implicitly sanctioned by the case of *Gall v. Comber*, 7 Taunt. 558, in the common pleas. And from the time of these last decisions until very recently, all the treatises on commercial contracts have stated the law in accordance with the opinion of Lord Ellenborough, taking the doctrine of Lord Mansfield to have been overruled. It is so stated in *Chitty on Contracts*, Russell on the Law Relating to Factors and Brokers, Smith's Commercial Law, and in other works treating of the subject. Nor has there been uniformity of decision on the subject in the courts of this country, though we think the decided weight of authority is in support of the doctrine announced in *Grove v. Dubois*. In the case of *Thompson v. Perkins*, 3 Mason, 232, before Judge Story, in 1823, the principle of *Grove v. Dubois* was repudiated as being incorrect, and that of *Morris v. Cleasby* sanctioned, though the facts of the case do not appear to have required a distinct ruling upon the particular question now presented. It was an action of *assumpsit* by the principal against the assignee of the factor *del credere* who had sold the goods of his principal and taken negotiable notes, payable on time, in his own name, for the amount of sales; and afterward, and before the notes became due, the factor failed, and assigned the notes to his assignee for the benefit of his creditors, and the assignee afterwards receiving the money due on the notes, it was held that the principal was entitled to recover the money so received from the assignee, subject to a deduction of the amount of the lien of the factor for his commissions and charges. Upon such state of facts, it is clear the right to recover was equally the result of the doctrine of Lord Mansfield as that of Lord Ellenborough. All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods, or to pursue his

tain percentage.¹ A factor under a *del credere* commission becomes liable to his principal when the purchase-money

goods, or the notes taken from them, into the hands of third parties, precisely as if no *del credere* contract existed. And though such right in the principal would seem to consist only with a collateral undertaking by the agent, yet, in the contract *del credere*, being *sui generis*, it is held in no wise to change the original and independent character of the agent's undertaking to his principal. In the case of *Swan v. Nesmith*, 7 Pick. 220, 19 Am. Dec. 232, occurring a few years after the case in 3 Mason, the supreme court of Massachusetts decided that the legal effect of a commission *del credere* was to make the agent liable at all events for the proceeds of the sale, so that he might be charged in *indebitatus assumpsit*, as for goods sold to him. There the contract was admitted to be original, and not collateral, and therefore not within the statute of frauds; and the necessary conclusion is, that the court intended fully to sanction the principle of *Grove v. Dubois*, to which, and the case of *Mackenzie v. Scott*, they refer for the definition of the nature of the commission *del credere*. And so in New York the same principle is established, as will be seen by reference to *Wolf v. Koppel*, 5 Hill, 458, and same case on appeal, 2 Dono, 368, and *Sherwood v. Stone*, 14 N. Y. 267. The two last cases, being in the court of last resort, fully approve and adopt, as far as we can discover from the opinions delivered, the principle of the cases of *Grove v. Dubois*, and *Mackenzie v. Scott*. Judge Story, however, in his work on agency, section 215, adopting his own view of the law as found in *Thompson v. Perkins*, supported by *Morris v. Cleasby*, and the cases in the common pleas, says that the true engagement of the agent *del credere* is merely to pay the debt, if it is not punctually discharged by the buyer; that, in legal effect, he warrants or guarantees the debt, and thus he stands more in the character of a surety for the debt than as a debtor. And the principle is so stated

in other American treatises. But with all due deference to the high authority of Judge Story, we think the decided weight of authority is against his position. In England, the question has been recently under discussion and re-examination, the result of which is quite at variance with the doctrine laid down in *Morris v. Cleasby*. In *Contourier v. Hastie*, 8 Ex. 39, the action was brought by the principal against his factor, who, on commission *del credere*, had sold a cargo of corn, and the purchaser refusing to comply with the contract on insufficient grounds, and afterward becoming bankrupt, the question was, whether the factor was liable for the non-fulfilment of the contract, by reason of his *del credere* commission, there being no guaranty in writing; and the court held the factor liable, not regarding the undertaking as one simply to pay the debt of another, within the fourth section of the statute of frauds; and the decision in *Wolf v. Koppel*, 5 Hill, 458, was referred to and adopted as containing sound law upon the subject. And in the more recent case of *Wickham v. Wickham*, 2 Kay & J. 478, Sir William Page Wood, then the vice-chancellor, and at present the lord chancellor of England, in referring to the case of *Contourier v. Hastie* as authority, said: 'When I look at the whole of that case, and consider the reasons given by the judges in delivering their judgments, though given very cautiously and guardedly, I cannot but conclude that they considered that an agent, entering into contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the persons whose agency he undertook; that the agreement so entered into by him was not a simple guaranty, but a distinct and positive undertaking on his part, on which he would become primarily liable. Otherwise, I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the statute of frauds.'

¹ *Kingston v. Wilson*, 4 Wash. 310.

is due; as between him and his principal, he then, in effect, becomes the purchaser, or is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, in the first instance.¹

ILLUSTRATIONS.—A cotton broker solicited orders for a firm of cotton buyers, receiving a commission of a fixed sum per bale from them, and looked to them, and not to the cotton, for its payment; each party paid its own expenses. In pursuance of an order procured by the broker, the firm obtained cotton, and sent the invoices thereof to the purchaser, and the bills of lading, with drafts attached, to the broker, with instructions not to deliver the bills of lading until the drafts were paid. *Held*, that the broker was not the partner, nor the general agent or factor, of the firm intrusted with the goods for sale within the statute: *Stollenwerck v. Thatcher*, 115 Mass. 224.

§ 228. Authority Implied to Factor.—A factor has implied authority to sell or buy in his own name,² and upon

Supposing this to be the correct conclusion deducible from the present state of the authorities, of which we have no doubt, the contract being distinct and positive, rendering the agent primarily liable, it necessarily follows that the agent stands in no such relation to his principal as that of mere surety for the price of the goods sold. His relation to his principal is that of debtor as well as agent, and being so, the legal consequences of the debtor relation must follow. Indeed, it was conceded in the case of *Leverick v. Moigs*, 1 Cow. 645, where the liability of such an agent was attempted to be restricted, that if by the engagement the agent became a debtor absolutely, as if he were himself the purchaser, he would be bound for the remittance of the money, as well as for its payment by the buyer. 'This arises from the general principle that the debtor is bound to make payment to his creditor, and consequently, if he remits a bill, which turns out of no avail, it is no payment. It does not discharge a precedent debt, unless it be so expressly agreed between the parties': 1 Salk. 124; 2 Johns. Cas. 441; *Glenn v. Smith*, 2 Gill & J. 493; 20 Am. Dec. 452; or, unless the creditor parts with the bill, or is

guilty of laches, to the prejudice of the debtor, in not presenting it for acceptance or payment in due time. Of course the agent, acting under a commission *del credere*, where the goods have been sold on an authorized credit, cannot be required to account to his principal before the expiration of the credit given to the buyer. And if the money which comes into his hands be remitted under special instruction from the principal, then it will be at the risk of the latter, provided the instructions are observed with proper caution and diligence on the part of the agent. But in this case it is not pretended that there were any special instructions in regard to the manner of remitting the money received by defendant. The remittance, therefore, was at his risk, as it would be of any other debtor remitting funds to discharge a debt due by him."

¹ *Cartwright v. Greene*, 47 Barb. 9.

² *Graham v. Duckwall*, 8 Bush, 12; *Joslin v. Cowee*, 52 N. Y. 90; *Story on Equity*, sec. 33; *Toland v. Murray*, 18 Johns. 24; *Murray v. Toland*, 3 Johns. Ch. 569; *White v. Chouteau*, 10 Barb. 202; *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327; *Ladd v. Arkell*, 37 N. Y. Sup. Ct. 35. He must

a reasonable credit,¹ unless such sale is contrary to usage or instructions,² to give a warranty,³ to receive payment,⁴ to insure the goods of the principal,⁵ and he may sue in his own name.⁶

§ 229. **Authority not Implied to Factor.**—A factor has no implied authority to barter his principal's goods,⁷ or to pledge them,⁸ or delegate his authority,⁹ or to receive

follow, however, the orders of his principal: *Cotton v. Hiller*, 52 Miss. 7; *Van Alen v. Vanderpool*, 6 Johns. 70; 5 Am. Dec. 192; except where he has drawn against the consignment first: *Cotton v. Hiller*, 52 Miss. 7; *Weed v. Adams*, 37 Conn. 378; *Brown v. McGrau*, 14 Pet. 479. A factor who has made advances to his consignor may proceed to sell, notwithstanding the service of an attachment sued out by a creditor of the consignor. The attaching creditor cannot arrest a sale without tendering to the factor the amount of his advances: *Baugh v. Kirkpatrick*, 54 Pa. St. 84; 93 Am. Dec. 675. Where a factor sells his principal's goods under a *del credere* commission, the title to the unpaid purchase-money is in the principal, not in the factor: *Moore v. Hillabrand*, 37 Hun, 491.

¹ *Goodenow v. Tyler*, 7 Mass. 36; 5 Am. Dec. 22; *Leland v. Douglass*, 1 Wend. 490; *Robertson v. Livingston*, 5 Cow. 473; *Van Alen v. Vanderpool*, 6 Johns. 70; 5 Am. Dec. 192; *Clark v. Van Northwick*, 1 Pick. 343; *Hapgood v. Batcheller*, 4 Met. 576; *Daylight Burner Co. v. Odlin*, 51 N. H. 59; 12 Am. Rep. 45; *Greely v. Bartlett*, 1 Mo. 178; 10 Am. Dec. 54; *Button v. Goodspeed*, 69 Ill. 238; *Byrne v. Schway*, 6 B. Mon. 201; *James v. McCredie*, 1 Bay, 294; 1 Am. Dec. 617; *Forrestier v. Bordman*, 1 Story, 43; *Foster v. Waller*, 75 Ill. 414; *Eraest v. Stoller*, 5 Dill. 438; *McConnico v. Curzen*, 2 Call, 358; 1 Am. Dec. 541.

² *Pinkham v. Crocker*, 77 Me. 563. But see *Durant v. Fish*, 40 Iowa, 559.

³ *Schuchardt v. Allen*, 1 Wall. 359.

⁴ *Evans on Agency*, 175; *White v.*

Chouteau, 10 Barb. 202; *Thompson v. Fargo*, 63 N. Y. 479; *Ladd v. Arkell*, 37 N. Y. Sup. Ct. 35; *Graham v. Duckwall*, 8 Bush, 12.

⁵ *Johnson v. Campbell*, 120 Mass. 449; *De Forest v. Fulton Ins. Co.*, 1 Hall, 84; *Lee v. Adsit*, 37 N. Y. 78; *Shoenfeld v. Fleisher*, 73 Ill. 404. But not in a mutual company: *White v. Madison*, 26 N. Y. 117.

⁶ *Wharton on Agency*, sec. 755; *Toland v. Murray*, 18 Johns. 24; *Girard v. Taggart*, 5 Serg. & R. 27; 9 Am. Dec. 327; *Ladd v. Arkell*, 39 N. Y. Sup. Ct. 35; *Considerant v. Brisbane*, 22 N. Y. 389; *Gorum v. Carey*, 1 Abb. Pr. 285; *Dows v. Rush*, 28 Barb. 157; *Isley v. Merriam*, 9 Cush. 242; 54 Am. Dec. 721; *Groover v. Warfield*, 50 Ga. 644; *Grinnell v. Schmidt*, 2 Sand. 706.

⁷ *Evans on Agency*, 176; *Wheeler etc. R. R. Co. v. Givan*, 65 Mo. 89; *Guerriero v. Peile*, 3 Barn. & Ald. 616; *Potter v. Dennison*, 10 Ill. 590; *Victor etc. Co. v. Heller*, 44 Wis. 265.

⁸ *Wright v. Solomon*, 19 Cal. 64; 79 Am. Dec. 196; *Bott v. McCoy*, 20 Ala. 578; 56 Am. Dec. 223; *Bonito v. Mosquera*, 2 Bosw. 401; *Rodriguez v. Heffeman*, 5 Johns. Ch. 429; *Urquhart v. Melver*, 4 Johns. 103; *Van Amringe v. Peabody*, 1 Mason, 440; *Kelly v. Smith*, 1 Blackf. 290; *Voss v. Robertson*, 46 Ala. 483; *Evans v. Potter*, 2 Gall. 13; *McCreary v. Gaines*, 55 Tex. 485; 40 Am. Rep. 818; *Kinder v. Shaw*, 2 Mass. 398; *Gray v. Agnew*, 14 Am. Law Rev. 457; *Bowie v. Napier*, 1 McCord, 1; 10 Am. Dec. 641; *Kennedy v. Strong*, 14 Johns. 128; *Macky v. Dillinger*, 73 Pa. St. 85; *Laussatt v. Lippincott*, 6 Serg. & R. 386; 9 Am. Dec. 440. Allowed now in some states by statute: See *Macky v. Dillinger*,

⁹ *Ante*, Chapter VI., Delegation of Authority.

payment except in the usual mode,¹ or to compound or discharge the debt,² or to accept or indorse bills on behalf of his principal,³ or to extend the credit,⁴ or to submit a dispute to arbitration.⁵ A sale by a factor creates a contract between the purchaser and the principal, and the former may pay the latter, even against the factor's wishes.⁶ "The general rule is,⁷ that a factor's sale creates a contract between the owner and the buyer; and where, a factor having sold upon credit, the owner or principal gives notice of his interest and claim to the buyer before payment, and requires him not to pay the factor, the buyer will not be justified in afterwards paying the factor. And this rule applies whether the factor has or has not named his principal at the time of the sale.⁸ There are exceptions to this rule, as where the factor sells in his own name, being himself responsible for the price of the goods sold, whether collected or not; or where he sells them to his own creditor, where there are mutual dealings. The principal cannot, in those cases, interfere to the prejudice of the party dealing with the factor, without any knowledge of his agency; and only the balance, if any be due to the factor, may be reclaimed by the principal."

§ 230. What Factor Bound to do—His Duties and Liabilities.—A factor is bound to obey the instructions

73 Pa. St. 85; *Hutchinson v. Bours*, 6 Cal. 385; *Jennings v. Merrill*, 20 Wend. 1; *Cartwright v. Wilmerding*, 24 N. Y. 521. See note in 58 Am. Dec. 165. Under the Missouri statutes a factor is not authorized to pledge the consignor's goods for an amount beyond the sum of the advances and charges thereon: *Steiger v. Third Bank*, 2 McCrary, 494. Where a consignor draws a sight draft upon his consignee before the latter has sold the goods consigned, a pledge by the consignee of the consignment, to secure a loan with which to meet the draft, is valid: *Boyce v. Commerce Bank*, 22 Fed. Rep. 53.

¹ *Evans on Agency*, 176; *Wharton on Agency*, sec. 741.

² *Evans on Agency*, 176.

³ *Evans on Agency*, 176.

⁴ *Myers v. Entriken*, 6 Watts & S. 44; 40 Am. Dec. 538; *Douglass v. Bernard*, Anth. 278. But he may alter the form of the security, provided it does not extend or impair the credit: *Corlies v. Cumming*, 6 Cow. 181.

⁵ *Carnochan v. Gould*, 1 Bail. 179; 19 Am. Dec. 669.

⁶ *Golden v. Levy*, 1 Car. Law Rep. 527; 6 Am. Dec. 555.

⁷ *Kelley v. Munson*, 7 Mass. 319; 5 Am. Dec. 47.

⁸ *Bull. N. P.* 130.

of his principal as to the terms on which he may sell,¹ or other matters.² If, however, a certain thing is left to the discretion of the factor, it is not a breach of orders to disregard a mere wish or desire expressed by the principal.³ If the factor is given discretion in the matter, he is not responsible for a loss arising from an error of judgment.⁴

¹ *Mann v. Laws*, 117 Mass. 293; *Scott v. Rogers*, 31 N. Y. 676; *Randle v. Moore*, 3 Johns. Cas. 36; *Williams v. Littlefield*, 12 Wend. 363; *Copes v. Phelps*, 24 La. Ann. 562; *Day v. Crawford*, 13 Ga. 509; *Atkinson v. Barton*, 4 Bush. 299; *Phillips v. Scott*, 43 Mo. 86; 97 Am. Dec. 369; *Gray v. Bass*, 42 Ga. 270; *Blot v. Boiceau*, 3 N. Y. 78; 51 Am. Dec. 345; *Martfield v. Goodhue*, 3 N. Y. 62; *Le Guen v. Gouverneur*, 1 Johns. Cas. 437; 1 Am. Dec. 121; *Urquhart v. McIver*, 4 Johns. 103; *Weed v. Adams*, 37 Conn. 378; *Milbank v. Dennistoun*, 21 N. Y. 386; *Bessent v. Harris*, 63 N. C. 542; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Jervis v. Hoyt*, 2 Hun. 637; *Wilson v. Wilson*, 26 Pa. St. 394; *Howatt v. Davis*, 5 Munf. 34; 7 Am. Dec. 681; *Bliss v. Arnold*, 8 Vt. 252; 30 Am. Dec. 467; *Johnson v. Wade*, 2 Baxt. 480; *Strong v. Stewart*, 9 Heisk. 137; *Maxwell v. Audinwood*, 15 Hun. 111; *Marshall v. Williams*, 2 Biss. 255; *Hall v. Storrs*, 7 Wis. 253; *Barksdale v. Brown*, 1 Nott & McC. 517; 9 Am. Dec. 729; *Durant v. Fish*, 40 Iowa, 559. See *George v. McNeill*, 7 La. 124; 26 Am. Dec. 498. Goods were consigned to a factor, with instructions to sell them "on arrival." The factor did not sell them on their arrival, and the market afterwards declined. *Held*, that he was liable for damages: *Evans v. Root*, 7 N. Y. 187; 57 Am. Dec. 512. Said the court: "It is laid down in *Paley on Agency*, edition of 1822, page 4, that the primary obligation of an agent whose authority is limited by instructions is to adhere faithfully to those instructions, for if he unnecessarily exceed his commission or risk his principal's effects, without authority, he renders himself responsible for the consequence of his act. In *Randle v. Moore*, 3 Johns. Cas. 36, it is said that 'if the defendants have, as the agents or factors of the plaintiffs,

through mistake or design, disobeyed their instructions, they are undoubtedly responsible.' So in *Parkist v. Alexander*, 1 Johns. Ch. 394, it is laid down that 'if an agent departs from the instructions of his principal, he does it at his peril.' In *Courcier v. Ritter*, 4 Wash. C. C. 549, it was held that it was the duty of an agent who was instructed to make sale of the article consigned for sale, 'immediately on arrival, to sell immediately on arrival, no matter at what loss.' See also, to the same effect, *Bell v. Palmer*, 6 Cow. 128, where an agent, under similar instructions, was held liable for refusing the first offer, although under the market price. And this is a reasonable doctrine, for if a loss occur by reason of an implicit obedience to the instructions of the owner, such loss falls on him. Considering the lateness of the season, and the probability of a rapid decline in prices, we can well see why the plaintiff would desire an immediate sale of the flour, and be willing to take the consequences of such deduction from the market price as might be necessary to effect a sale, rather than incur the danger of delay. The supreme court, in refusing a new trial, placed their decision upon the uncertain nature of the instructions. But it seems to us that a direction 'to sell on arrival' is an explicit instruction; and the defendant seems to have so understood it, in his letter of the 25th of August. It is substantially like the instruction in the cases in the sixth volume of *Cowen*, and in *Washington's circuit court reports*."

² *Shoenfield v. Fleisher*, 73 Ill. 494; *De Tastett v. Crousillat*, 2 Wash. 132.

³ *Harper v. Kean*, 11 Serg. & R. 280; *Vianna v. Barclay*, 3 Cow. 281; *La Fargo v. Kneeland*, 7 Cow. 456.

⁴ *Milbank v. Dennistoun*, 21 N. Y. 386.

If no instructions are given him as to the terms or time of sale, he is at liberty to sell at such time and on such terms as his best discretion prompts.¹ But if factors have made advances on the goods in their hands, the principal's orders may be disobeyed, and they may sell at a time or on terms which they may deem best to indemnify themselves.² Thus a factor who has made advances on goods may sell them below the price limited, if the consignor has after notice refused to repay the advances.³ The rule is stated at length by Mr. Justice Story in a leading case.⁴ "We understand," says he, "the true doctrine on the subject to be this: Whenever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made, or liabilities incurred on account thereof, and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances, or meet such liabilities, unless there is some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if contemporaneous with the consignment, and advances or liabilities, there are orders given by the consignor which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the

¹ *Marfield v. Goodhue*, 3 N. Y. 62; *Given v. Leinoine*, 35 Mo. 110.

² *Brown v. McGrau*, 14 Pet. 479; *Feild v. Farrington*, 10 Wall. 141. He has entire discretion as to time, price, and place of sale, and is not even limited by positive instructions

where he has made advances upon consignments, and the disposal thereof becomes necessary to protect himself against loss: *Phillips v. Scott*, 43 Mo. 86; 97 Am. Dec. 369.

³ *Parker v. Brancker*, 22 Pick. 40.

⁴ *Brown v. McGrau*, 14 Pet. 479.

goods to reimburse his advances or liabilities until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price, unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities. Of course this right of the factor to sell to reimburse himself for his advances and liabilities applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity." The principal cannot revoke the factor's authority to sell the goods in his hands, after advances have been made by him, except as to the surplus of goods in his hands after liquidating the advances.¹ In New York and

¹ Howard v. Smith, 56 Mo. 314; etc. R. Co., 2 Ill. App. 180; Benny v. Bell v. Hannah, 3 Baxt. 47; Mooney v. Rhodes, 18 Mo. 147; 59 Am. Dec. Musser, 45 Ind. 115; Nelson v. Chicago 293.

some other states the rule in the federal courts has been thought too lax, and it is held that the factor must obey the principal's orders, although he has made subsequent advances, unless the principal, after a reasonable notice, fails to repay the advances.¹ And the factor may disregard instructions as to time or terms of sale, where an emergency has arisen which requires that they be sold at once or there will be a great loss, or where the goods are of a perishable nature, and not in a condition longer to keep.²

¹ *Marfield v. Goodhue*, 3 N. Y. 62; *Blot v. Boiceau*, 3 N. Y. 78; 51 Am. Dec. 345; *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Hinde v. Smith*, 6 Laus. 464; *Whelan v. Lynch*, 65 Barb. 327; *Upham v. Lafavour*, 11 Met. 174; *Frothingham v. Everton*, 12 N. H. 239; *Weed v. Adams*, 37 Conn. 378; *Stall v. Meek*, 70 Pa. St. 181; *Whitney v. Wyman*, 24 Md. 131; *Ward v. Bledsoe*, 32 Tex. 251; *Mooney v. Musser*, 45 Ind. 115.

² *McCollough's Commercial Dictionary*, tit. Factors; *Wharton on Agency*, sec. 759. See *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604; *Chapman v. Walton*, 10 Bing. 57; *Forrestier v. Bordman*, 1 Story, 43; *Ward v. Bledsoe*, 32 Tex. 251; *Weed v. Adams*, 37 Conn. 378; *Howland v. Davis*, 40 Mich. 545; *Butterfield v. Stephens*, 59 Iowa, 596; *Blair v. Childs*, 10 Heisk. 199; *Joslin v. Cowee*, 52 N. Y. 95, where it is said: "It is the duty of a factor to do his utmost to protect his principal from loss, and in extraordinary emergencies he is authorized to assume extraordinary powers, even to the extent of deviating from the general instructions of his principal." In *Greenleaf v. Moody*, 13 Allen, 363, the court said: "The ordinary rule is clear, that factors must obey the instructions of their principal; that they may not compromise debts without authority; that they must, under a change of circumstances, advise the consignor, and await his directions; and that they must conform to the usages of trade presumed to be known to both parties, or to the course pursued by them and approved by the owner in

former instances. But what is their duty in novel, critical, and unforeseen emergencies? To answer this question, we may refer to an opinion of Mr. Justice Story in a suit relative to the conduct of a supercargo who had totally departed from the instructions of the shipper, which is so apposite that we adopt its principles and the substance of its language. In circumstances of necessity or great urgency, it is only necessary that the agent should act *bona fide* and with reasonable discretion. 'What, then, was it the duty of the supercargo to do in such a case of unexpected occurrence, not within the contemplation of the instructions?' 'Now, I take it to be clear, that if, by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner and sacrifice his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion.' 'He becomes, in such a case, an agent from necessity for the owner.' 'In all voyages of this sort there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency, created by operation and intendment of law': *Forrestier v. Bordman*, 1 Story, 43, 51. A justification founded upon necessary departure from the ordinary customs of trade or from actual instructions must undoubtedly be construed with

The factor must use diligence to ascertain the purchaser's solvency,¹ and must sell within a reasonable time where no limit has been set;² he is bound to account³ and to remit to his principal when instructed to do so;⁴ he is bound to sell at the best price he can obtain,⁵ and to use the best diligence generally.⁶ He must act in good faith towards his principal.⁷ He cannot become the purchaser of his principal's goods for himself,⁸ or act as agent for both seller and buyer.⁹ If a factor has orders to sell for cash, and sells and delivers to a person in good credit, and the next day sends in his bill, which the purchaser does not pay, having in the mean time become insane, the factor does not thereby become liable to the principal.

considerable strictness. The agent cannot be allowed lightly or unadvisedly to assume a latitude of discretion not conferred upon him by express authority, or by those usages of trade which both parties are presumed to have known and contemplated. But the interests of commerce require, and the enlightened principles of commercial law bestow, a discretion which enables the factor to protect his principal from the irreparable injury which would be liable to arise in the absence of authority to act under critical circumstances, unexpectedly occurring, which do not admit of delay, for the purposes of communication and consultation. And the factor, so placed, who acts prudently and in good faith, as the owner himself, being a wise man, would have been likely to do if personally present, finds his protection in the sincerity and sound discretion of his conduct, and is not answerable for consequences, although subsequent events may demonstrate that his principal would have been the gainer by a different course from the one he has conscientiously and discreetly adopted."

¹ Van Alen v. Vanderpool, 6 Johns. 69; 5 Am. Dec. 192.

² Porter v. Blood, 5 Pick. 54.

³ Clark v. Moody, 17 Mass. 145; Terwilliger v. Beals, 6 Lans. 403; Keighler v. Savage Mfg. Co., 12 Md. 383; 71 Am. Dec. 600.

⁴ Clark v. Moody, 17 Mass. 145; Fordyce v. Peper, 16 Fed. Rep. 516. If a factor in Alabama neglects for two years to render to his principal here an account of sales, he is liable for the neglect, although no demand was ever made: Langley v. Sturtevant, 7 Pick. 214. If a factor at New Orleans adjust his accounts in Boston, and promise to pay the balance as soon as he can negotiate exchange on New Orleans, he thereby waives the privilege, if he had any, of paying it in New Orleans: Jellison v. Lafonta, 19 Pick. 244.

⁵ Merlo v. Hascall, 10 Mo. 406; Ward v. Bledsoe, 32 Tex. 251; Bigelow v. Walker, 24 Vt. 149; 58 Am. Dec. 156.

⁶ Folsom v. Mussey, 8 Me. 400; 23 Am. Dec. 522; Atkinson v. Burton, 4 Bush, 299; Leverick v. Meigs, 1 Cow. 645; Phillips v. Moir, 69 Ill. 155; Ernest v. Stoller, 5 D. Ill. 438; McCants v. Wells, 3 S. C. 569; Francis v. Casleman, 4 Bibb, 282; Deshler v. Beers, 32 Ill. 368; 83 Am. Dec. 274; Chandler v. Hogle, 58 Ill. 46; Foster v. Waller, 75 Ill. 464.

⁷ Babcock v. Orbison, 25 Ind. 75; Clarke v. Tipping, 9 Beav. 284; Evans v. Potter, 2 Gall. 12.

⁸ The principal may repudiate or affirm such a transaction at his election: Wadsworth v. Gay, 118 Mass. 44.

⁹ Bensley v. Moon, 7 Ill. App. 415.

pal, his course being according to the usage of commission merchants.¹ A factor is only required to act with reasonable diligence and care in his employment. The known usages of trade and business enter into his employment, and if he conducts his business according to such usages, he will be exonerated from all responsibility.²

A factor or other agent who is guilty of fraud or gross negligence in the conduct of his principal's business forfeits all claim to commission or other compensation for his services.³ In *Greely v. Bartlett*⁴ the rules regarding the duties of factors were stated by Mellen, C. J., thus: "The relation subsisting between principal and factor is such as necessarily to require great confidence on one part, and great care, attention, and fidelity on the other. Without all these it is impossible that the extensive concerns of the commercial part of the world can be managed with advantage, or even preserved from confusion. Hence the importance of continuing in their full force those legal principles which have been established for the protection of the rights of both parties, and of third persons who may be engaged with such factor in the transaction of commercial business. Some of these general principles may be stated. By the law merchant a factor may sell the goods of his principal on a reasonable credit, unless he is restrained from so doing either by his instructions or by the use of the trade to which the transaction relates. A sale made under such circumstances is at the risk of the principal, and if a loss happens he must bear it. But he is not authorized to give credit except to such persons as prudent people would trust with their own property. He may receive securities in his own name for goods sold without subjecting himself to liability merely by so doing. But he must deliver such securi-

¹ *Clark v. Van Northwick*, 1 Pick. 343.

² *Phillips v. Moir*, 69 Ill. 155.

³ *Fordyce v. Peper*, 16 Fed. Rep. 516.

⁴ 1 Mc. 172; 10 Am. Dec. 54.

ties to his principal if he demand them, or in case of loss he will be answerable as for a breach of trust, though in such case the principal should pay him his usual commissions. If through carelessness or want of proper examination and inquiry he give credit to a man who is insolvent, should a loss happen he must indemnify the principal. And if a debt be lost by the inattention of the factor in omitting to collect it when in his power to do so, he will be liable for it. He must be honest and faithful, and must give his principal all necessary or useful information respecting the concerns of his agency." A factor who takes notes in his own name for goods of his principal sold, and uses them himself, will be liable to the principal for their sum if the purchaser becomes insolvent before they are paid.¹ So a broker or factor cannot dispute his principal's title.² He is not bound to insure unless so instructed.³

ILLUSTRATIONS. — A debtor delivered merchandise to his creditor to sell, and appropriate the proceeds to his debt. The creditor did not sell for nearly six years, during which time the goods were much depreciated in value. *Held*, that the creditor was liable, as a factor, for negligence in not selling before: *Porter v. Blood*, 5 Pick. 54. A factor agreed with his principal to purchase for him fifty thousand bushels of wheat, in consideration that the latter would immediately forward to him by express ten thousand dollars, and the residue to pay for such purchase in four or five days, and the principal wholly failed to forward the money, though the factor had immediately purchased twenty thousand bushels of the wheat. *Held*, that the factor was under no obligation to purchase the residue of the fifty thousand bushels: *Rice v. Montgomery*, 4 Biss. 75. Commission merchants, to whom a manufacturing company sent goods in their brown state to be sold, sent them to a printing establishment, had them printed, and then sold them. *Held*, that if the printing was advantageous to the

¹ *Myers v. Entriken*, 6 Watts & S. 44; 40 Am. Dec. 538; *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642.

² *Marvin v. Ellwood*, 11 Paige, 365; *Barnard v. Kobbe*, 54 N. Y. 516; *Jones v. Dwyer*, 15 East, 21; *Roberts v.*

Ogilby, 9 Price, 269; *Ross v. Curtiss*, 31 N. Y. 606; *Kieran v. Sanders*, 6 Ad. & E. 515.

³ *Etna Ins. Co. v. Jackson*, 16 B. Mon. 242; *Schaeffer v. Kirk*, 40 Ill. 251; *Crosbie v. McDoual*, 13 Ves. 148.

manufacturing company, they should have the benefit; but if the printing caused a loss, the manufacturing company should be credited with the value of the goods in their brown state: *Vandyke v. Brown*, 8 N. J. Eq. 657. A factor having sold cotton of his principal contrary to instructions, and being directed to ship to L., concealed the fact of the sale, and procured other cotton of a similar quality, which he shipped in the name of his principal to L., where it was sold and the proceeds received by the planter. *Held*, that the principal was entitled to recover the difference between the price in L. and the price his cotton was sold at: *Austill v. Crawford*, 7 Ala. 335. H., a commission merchant in Chicago, under instructions from S., in Osceola, sold for S. five thousand bushels of oats upon a time contract, and negligently failed to require a margin in accordance with the rules of the board of trade, or to notify S. of his right to demand such margin, and also neglected to advise S. that he had sold the oats to parties who were operating a corner, which, to be successful, required to be maintained for thirty-two days longer. *Held*, that, upon the failure of the buyers, whereby S. lost the benefit of the contract, he was entitled to recover from H. the amount of such loss: *Howe v. Sutherland*, 39 Iowa, 484. A., having property consigned to him for sale on commission, placed it in the hands of W. for storage, but afterwards sold it to N. *Held*, that W. could not thereupon retain the property as security for a debt due to him from A.: *Wesling v. Noonan*, 31 Miss. 599. B. consigned to H., as his factor, a certain number of barrels of flour, and drew on him for the amount due. The draft was discounted by a bank on the faith of the bill of lading issued upon the shipment of the flour. This bill was annexed to the draft, as a collateral security, and was thus transferred to the bank, but was not indorsed or formally assigned, H. having refused to accept the draft. *Held*, that H. was not at liberty to appropriate the flour or its proceeds to his own use. They were the property of the bank for the purpose of meeting the dishonored draft: *Davenport Nat. Bank v. Ho-meyer*, 45 Mo. 145; 100 Am. Dec. 363. A factor receives cotton without specific instructions with regard to the time of sale, and advances thereon, and sells at a profit of ten per cent, to the consignor. The factor is not liable in damages to the consignor on a subsequent rise in the market, though some time after the first instructions he had received orders from his consignor not to sell, and replied, "Your wishes with regard to the cotton are noted": *Brown v. McGrau*, 14 Pet. 479. A authorized a factor to purchase goods on a particular credit, which he did. *Held*, that A was liable directly to the vendor of the goods for the purchase-money: *Edwards v. Benham*, 2

Stew. & P. 147. The commission merchant of a general owner, having a certain amount of wheat under the care of a warehouseman, innocently gives an order for the delivery of a larger quantity of wheat to a vendee, which order was filled by the warehouseman from a different lot of wheat belonging to another person. *Held*, that by accepting the money for such wheat, the commission merchant adopted as his own the act of the warehouseman, and was liable to the person whose wheat was used for the price of the same in an action for money had and received to his use: *Cobb v. Dows*, 10 N. Y. 335. A factor sold goods to J. F. on a credit of six months, taking a note payable to himself, including in it a debt owing to himself, and afterwards released to J. F., and came in under the assignment. *Held*, that by these acts he made the debt his own: *Brown v. Arrott*, 6 Watts & S. 402. The owner of hay in Maine consigned it to New Orleans to be sold during the Rebellion. The military authorities of the United States bought a portion, agreeing to pay for it in cash, and seized the remainder; and afterwards refused to pay for any of it except in government certificates of indebtedness, bearing interest, to be taken at par. The consignees, acting in good faith and according to their best judgment and the usual custom of factors at New Orleans at that time, but without notice to the owner, accepted these certificates of indebtedness, and shortly afterwards sold the same at ninety-three cents on the dollar, which was then their market value there. The owner was ignorant of this custom. *Held*, that the factors were not liable to the owner for the discount of seven per cent made in selling the certificates of indebtedness: *Greenleaf v. Moody*, 13 Allen, 363. A commission merchant wrote to a manufacturer of goods requesting a consignment of his goods invoiced at the lowest rates, stating what the charges would be, promising to pay the return freight, if satisfactory prices could not be obtained, and to be responsible for any neglect by him to deal with the goods according to the manufacturer's orders. The manufacturer replied, in a letter accompanying the shipment of goods, that he had invoiced the goods at the lowest selling prices, and that the small shipment "then made will be duplicated if prices obtained warrant." The invoice contained no direction to sell the goods at the invoiced prices. The consignee sold for a less price. The consignor wrote him that the price obtained was not satisfactory, but made no claim that any order had been violated, and afterwards brought an action to recover the difference between the invoice price and that for which the goods were sold, in which the declaration contained no averment that the consignee had acted unfaithfully or injudiciously. *Held*, that the action could not

be maintained: *Mann v. Laws*, 117 Mass. 293. A agreed to take B's sewing-machines on consignment to sell, to make prompt returns, to remit cash for all disposed of except on lease or on monthly installments, and to pay for those in three, six, and nine months, by note, secured, if required, by the leases or installment accounts. The agreement stated that A did not expect the privilege of returning machines. *Held*, that A became personally liable for all machines received: *Wheeler and Wilson Mfg. Co. v. Laus*, 62 Wis. 635.

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PART V.—MASTER AND SERVANT.

CHAPTER XX.

SCOPE OF THIS PART.

§ 231. Who are servants.

§ 231. **Scope of This Part—Who are Servants.**—In a general sense, a servant is one who is by contract or by operation of law subject to the authority or control of another. Tested by this definition, the title of this division of agency might properly be the main title of the general title, for in this broad sense all employees of every kind, all persons employed by another,—attorneys, brokers, commission merchants, factors, special and general agents of every kind,—might and ought to be considered under this head. But in the previous chapters of this title most of these relations have been treated of, and the present and subsequent chapters are restricted to servants of a different kind, that is to say, in the nomenclature of the older writers, menial servants, or better perhaps in this day and country, domestic or hired servants.¹ This will include apprentices, domestic servants, and workmen and laborers of every kind and description.² *Prima facie*, one found doing service for another is in his employ. If the fact is otherwise, it must be made to appear.³

¹ See *Ex parte Meason*, 5 Binn. 174; *Boniface v. Scott*, 3 Serg. & R. 352; *Burgess v. Carpenter*, 2 S. C. 7; 16 Am. Rep. 643.

² The general rules relating to all
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kinds of agents and employees are discussed in the title Agency, and this includes the master's liability for his servants' contracts.

³ *Perry v. Ford*, 17 Mo. App. 212.

CHAPTER XXI.

APPRENTICES.

- § 232. Who are apprentices — How bound.
- § 233. Contract is personal — Assignment — Removal out of state.
- § 234. Duties of master to apprentice.
- § 235. Right of master to discharge apprentice.
- § 236. Right of master to apprentice's earnings — Exception.
- § 237. Rights of parent or guardian.
- § 238. Liabilities of parent or guardian.
- § 239. What is, and what will excuse, breach of covenant for faithful service.

§ 232. **Who are Apprentices—How Bound.**—An apprentice is a person—usually a minor—who is bound to another for a fixed period to learn a trade or calling.¹ The apprentice, being an infant, must be bound by his parent or guardian.² Any person who is legally competent to carry on a trade or business may take an apprentice.³ The contract of apprenticeship must be in writing, and if certain forms are prescribed by statute those forms must be followed.⁴ A deed of indenture is, if defective, in some states void;⁵ in others only voidable.⁶ The in-

¹ In Georgia, indentures of apprenticeship during minority do not become void on arrival of the female apprentice at eighteen years of age, as being in restraint of her right of marriage at that age; her majority under the law being at twenty-one: *Dent v. Cock*, 65 Ga. 400. But a person over twenty-one may bind himself as an apprentice: *Commonwealth v. Sturgeon*, 2 Browne, 208.

² In *re McDowle*, 8 Johns. 328; *Handy v. Brown*, 1 Cranch C. C. 610; *Phelps v. Culver*, 6 Vt. 430; *Peters v. Lord*, 18 Conn. 337; *Blunt v. Melcher*, 2 Mass. 228; *Bull v. Follett*, 5 Cow. 170; *Mead v. Billings*, 10 Johns. 99. Not by the mother, if the father be living: *Commonwealth v. Crommie*, 8 Watts & S. 339; but *aliter*, if father be dead or incapable: *People v. Gates*, 43 N. Y. 40. *Contra*, that the infant

may bind himself: *Woodruff v. Logan*, 6 Ark. 276; 42 Am. Dec. 695; and see *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662; *Walker v. Chambers* 5 Harr. (Del.) 311.

³ *Wood on Master and Servant*, sec. 40.

⁴ In *re McDowle*, 8 Johns. 328; *Peters v. Lord*, 18 Conn. 337; *Hall v. Rowley*, 2 Root, 161; *Squire v. Whipple*, 1 Vt. 69; *Huntington v. Oxford*, 4 Day, 189; *Reidell v. Morse*, 19 Pick. 358; *Whitmore v. Whitcomb*, 43 Me. 458; *Tague v. Hayward*, 25 Ind. 427; *Morrill v. Kennedy*, 22 Ark. 324; *Bolton v. Miller*, 6 Ind. 262; *People v. Gates*, 39 How. Pr. 74.

⁵ *Guthrie v. Murphy*, 4 Watts, 80; *Austin v. McCluney*, 5 Strob. 104; *Chaudet v. Stone*, 4 Bush, 210; *Butler v. Hubbard*, 5 Pick. 250.

⁶ *Hamilton v. Eaton*, 6 Cow. 658; *Luby v. Cox*, 2 Harr. (Del.) 184.

fant must join in the indenture, else he will not be bound after he reaches the age of fourteen;¹ and if his joining in the indenture is required by statute, he will not be bound at all if he does not so join;² and the assent of the infant to the contract must be clearly shown.³

§ 233. Contract is Personal—Assignment—Removal out of State.—The contract is personal, and cannot be transferred by the master to another,⁴ except with the consent of the infant.⁵ An apprentice cannot be bound to more than one person at once;⁶ nor is the apprentice bound to go with the master and serve him in another state or country.⁷ But if he goes willingly, the service continues.⁸

§ 234. Duties of Master to Apprentice.—The master is bound to perform the obligations he has assumed in the indenture. He is bound to teach him the trade or calling to learn which the apprentice has been bound,⁹ to treat him humanely,¹⁰ to supply him with proper food and clothing.¹¹ He has no right to make the apprentice work on Sunday.¹² The master may show that by the contract the duty of supplying the apprentice with food

¹ *Hudson v. Worden*, 39 Vt. 382; *R. v. Keppele*, 2 Dall. 197.

² *Ivins v. Norcross*, 3 N. J. L. 977.

³ *Harper v. Gilbert*, 5 Cush. 417.

⁴ *Campbell v. Cooper*, 34 N. H. 49; *Tucker v. Magee*, 18 Ala. 99; *Ayer v. Chase*, 19 Pick. 556; *Versailles v. Hall*, 5 La. 281; 25 Am. Dec. 178.

⁵ *Williams v. Finch*, 2 Barb. 208; *Nickerson v. Howard*, 19 Johns. 113; *Lobdell v. Allen*, 9 Gray, 377.

⁶ *Thorpe v. Rankin*, 19 N. J. L. 36; 38 Am. Dec. 531.

⁷ *Negro Gusty v. Diggs*, 2 Cranch C. C. 210; *Coffin v. Bassett*, 2 Pick. 357; *Dyer v. Hunt*, 5 N. H. 401; *Vickeree v. Pierce*, 12 Me. 315; *Randall v. Rotch*, 12 Pick. 107; *Walters v. Morrow*, 1 Houst. 527.

⁸ *Lobdell v. Allen*, 9 Gray, 377; *Olney v. Myers*, 3 Ill. 311; *Burden v. Skinner*, 3 Day, 126. See *Nickerson v. Easton*, 12 Pick. 110.

⁹ *Wood on Master and Servant*, sec. 49; *R. v. Peck*, 1 Salk. 66.

¹⁰ *McGrath v. Herndon*, 4 T. B. Mon. 480.

¹¹ *Wood on Master and Servant*, sec. 49. A master having notice of the sickness of his apprentice at the house of a brother of the latter, held, to be liable for the brother's necessary expenses and trouble incurred thereby, although a removal would have been hazardous: *Rice v. Breheny*, 2 Houst. 74.

¹² *Commonwealth v. St. G. Mans*, 1 Browne, 24.

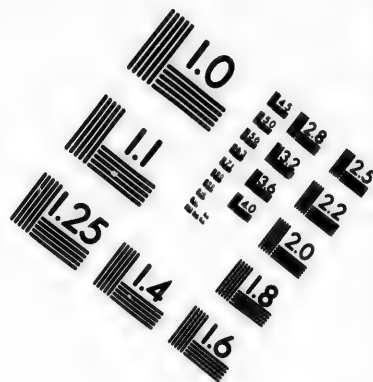
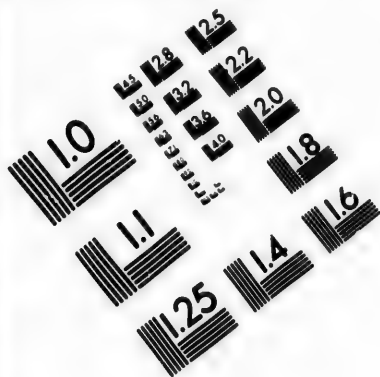
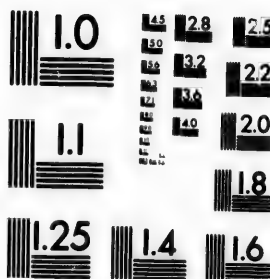


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and clothing has been assumed by the father or guardian;¹ or that the apprentice cannot or will not learn.² The apprentice cannot recover for extra work, even where the work was done upon the master's express promise to pay for it.³ The master may recover against a third person who has negligently injured the apprentice.⁴

§ 235. **Right of Master to Discharge Apprentice.**—He has no right to dismiss the apprentice for misconduct,⁵ or dishonesty,⁶ or because he has become incapacitated for labor by accident, sickness, or disease.⁷

§ 236. **Right of Master to Apprentice's Earnings.**—**Exception.**—All the earnings of the apprentice during the term belong to the master.⁸ To this rule, however, there

¹ Wood on Master and Servant, sec. 49.

² Raymond v. Minton, L. R. 1 Ex. 244; Wright v. Brown, 5 Md. 37; Clancy v. Overman, 1 Dev. & B. 402; Barger v. Caldwell, 2 Dana, 131.

³ Bailey v. King, 1 Whart. 113; 29 Am. Dec. 43.

⁴ Ames v. Union R. R. Co., 117 Mass. 541; 19 Am. Rep. 426.

⁵ Phillips v. Clift, 4 Hurl. & N. 168; Wise v. Wilson, 1 Car. & K. 662; Lord Denman, C. J., saying: "A person has a right to dismiss a servant for misconduct, but he has no right to turn away an apprentice because he misbehaves."

⁶ Powers v. Ware, 2 Pick. 452.

⁷ Wood on Master and Servant, sec. 49; R. v. Owen, 1 Strange, 99.

⁸ James v. Le Roy, 6 Johns. 274; Bowes v. Tibbets, 7 Mo. 457; Muncey v. Goodwin, 3 N. H. 272; Bailey v. King, 1 Whart. 113; 29 Am. Dec. 42. If a master would recover from a third person the value of services rendered him by the master's apprentice, a valid contract of apprenticeship must be shown: Barton v. Ford, 35 Hun, 32. In *Bardwell v. Purrington*, 107 Mass. 427, the court say: "With regard to the defendant's offer to prove that he had paid the boy for his labor, we think that at that stage of the case it was rightfully rejected. It was not offered in connection, as we understand

the report, with any evidence tending to show that the plaintiff had abandoned any of his rights, or had been wanting in due and reasonable exertion and diligence to reclaim the apprentice. If he had not lost his right to the services of the apprentice by any fault of his own, the fact that a stranger, who had the benefit of them, had paid a party who had no right to the payment, would be immaterial. There might be circumstances from which the jury might very properly infer that the plaintiff had abandoned the right to hold the apprentice. The propriety of such an inference would depend on what the plaintiff knew, or had the means on reasonable inquiry of knowing, as to where the apprentice was and what he was doing. If the plaintiff knowingly suffered the apprentice to make and perform contracts for service, or if the plaintiff knowing where he could be found made no efforts or neglected opportunities to reclaim him and hold him to his service, he could not maintain his action; in other words, his relinquishment of all right to hold the apprentice under the indenture could be proved by circumstantial evidence. Mere payment by the defendant to the apprentice without the knowledge or default of the plaintiff, would not affect the question."

are two exceptions, viz.: 1. Where the earnings are with the consent of the master and contrary or inconsistent with the covenants of the indenture;¹ 2. Where the earnings are of an extraordinary character, and have not interfered with the master's rights.²

§ 237. Rights of Parent or Guardian.—The parent or guardian may sue for any breach of covenants in the indenture.³

§ 238. Liabilities of Parent or Guardian.—The parent or guardian is bound personally to the covenants made by him in the indenture.⁴ Strict proof, however, of an intention to bind the parent or guardian must be shown.⁵

§ 239. What is, and What will Excuse, Breach of Covenant for Faithful Service.—It is a breach of the covenant for faithful service for the apprentice to absent himself from the service, unless the absence is a trifling or temporary one.⁶ The following will excuse a breach of the covenant for faithful service by justifying the apprentice leaving; viz., that the term has expired by effluxion of time, or by consent of the parties;⁷ that the masters being partners, the partnership has been dissolved,⁸ or one of the partners has died;⁹ that the master behaved to the apprentice immorally or cruelly;¹⁰ that the master has

¹ *Bardwell v. Purrington*, 107 Mass. 427; *Kelly v. Sprout*, 97 Mass. 169; *Manchester v. Smith*, 12 Pick. 115; *Randall v. Rotch*, 12 Pick. 107.

² *Mason v. The Blaireau*, 2 Cranch, 240.

³ *Lobdell v. Allen*, 9 Gray, 381; *Balch v. Smith*, 12 N. H. 437.

⁴ *Wood on Master and Servant*, sec. 52.

⁵ *Blunt v. Melcher*, 2 Mass. 228; *Berry v. Wallace*, Wright, 657; *Woodruff v. Corry*, 3 N. J. L. 540; *Holbrook v. Bullard*, 10 Pick. 68.

⁶ *Cuming v. Hill*, 3 Barn. & Ald. 59.

⁷ *Hooks v. Perkins*, Busb. 21; *Powers v. Ware*, 2 Pick. 451.

⁸ *Hiatt v. Gilmer*, 6 Ired. 450.

⁹ *R. v. Peck*, 1 Salk. 66; *Baxter v. Burfield*, 2 Strange, 1266.

¹⁰ *Commonwealth v. St. Germans*, 1 Browne, 24; *Warner v. Smith*, 8 Conn. 14; *Cannon v. Davis*, 1 Cranch C. C. 457; *McGrath v. Herndon*, 4 T. B. Mon. 480; *Coffin v. Bassett*, 2 Pick. 357; *Commonwealth v. Conrow*, 2 Pa. St. 402.

changed his business,¹ or has become physically or mentally incompetent to conduct it any longer, or has died.² A master who takes an apprentice for the purpose of instructing him in any particular act or trade has no right to require services from him as a menial or house-servant.³

ILLUSTRATIONS.—A apprenticed himself to B to learn a certain trade, but also to do "such other chores and labor when required, as would become necessary to B." *Held*, that a request by B that A should go into the cellar under the shop, and open and repair a drain that the water might run off, was reasonable under the contract: *McPeck v. Moore*, 51 Vt. 269.

¹ Wood on Master and Servant, sec. 52; *Hennessey v. Deland*, 110 Mass. 52; *Ellen v. Topp*, 6 Ex. 424. 145.

² Wood on Master and Servant, sec. 52; *Com. v. Hemperly*, 4 Pa. L. J. 440.

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CHAPTER XXII.

CONTRACTS BETWEEN, AND RIGHTS AND DUTIES OF, MASTER AND SERVANT.

- § 240. Contract of service — Need not be in writing.
- § 241. Services rendered — When promise to pay implied.
- § 242. Services of intruder without request.
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- § 282. Dissolution of contract—When service may be dissolved by either party.
- § 283. Dissolution of contract—Dissolution of partnership.
- § 284. Dissolution of contract—Bankruptcy of master.
- § 285. Dissolution of contract—Abandonment of servant.
- § 286. Dissolution of contract—Dismissal by master.
- § 287. Dissolution of contract—By death or disability.
- § 288. Rights of master—Injuries to servant by third person.
- § 289. Enticing servant from employment.
- § 290. Combinations among workmen.

§ 240. Contract of Service—Need not be in Writing.
 —To constitute the relation of master and servant the contract need not be in writing, except where required to be by the statute of frauds. An infant's contract to serve a railroad company as employee is valid as between himself and the company; and want of the previous consent of the parent does not avoid it. It remains good until either the parent or his minor child puts an end to it.¹

§ 241. Services Rendered—When Promise to Pay Implied.—The mere fact that services are rendered for another does not raise an implied promise by the latter to pay for them.² The test always is, Did the plaintiff expect pay for them, and did the defendant expect to pay for them?³ If the services are rendered without any expectation of compensation, and are accepted with that understanding, no promise to pay can be implied.⁴ Where one has employed another to manufacture articles at an agreed

¹ Nashville etc. R. R. Co. v. Elliott, 1 Cold. 611; 78 Am. Dec. 506.

² Wood on Master and Servant, sec. 62; Ryan v. Lynch, 9 Mo. App. 18.

³ Nimmo v. Walker, 14 La. Ann. 581; Sprague v. Waldo, 33 Vt. 139; Chénaiquy v. Delicèrè, 37 Ill. 237; Watkins v. Richmond College, 41 Mo. 302; Morris v. Barnes, 35 Mo. 412; Hart v. Hess, 41 Mo. 441; Robinson v. Cush-

man, 2 Denio, 149; Angulo v. Sunol, 14 Cal. 402; Fraylor v. Sonora M. Co., 17 Cal. 594; Palmer v. Haverhill, 98 Mass. 487; Ryan v. Dayton, 25 Conn. 188; 65 Am. Dec. 560.

⁴ Morris v. Barnes, 35 Mo. 412; James v. O'Driscoll, 2 Bay, 101; 1 Am. Dec. 632; Hertzog v. Hertzog, 29 Pa. St. 465; Zerrahn v. Ditson, 117 Mass. 553.

price, out of materials to be furnished by the former, the fact that he himself, without request, assists in the manufacture, will not raise an implied promise on the part of the other party to pay for such services.¹ "If the person for whom the services are rendered has reason to expect or to believe that the person expects to be paid for his labor, and does nothing to disabuse him of this expectation, but allows him to go on rendering important services for him, the law will imply a promise to pay him what such services are reasonably worth."² A promise to pay reasonable expenses of keeping and repairing a boat found adrift on the water is implied when the owner of the boat takes it from the person who found it.³

ILLUSTRATIONS.—B., while a minor, entered the service of S. as a member of his family, with the understanding that she was not to have pay for such service; but subsequently she expressed dissatisfaction to S. that she was not receiving pay for her services, whereupon S. told her "he would pay her for her work." *Held*, that this constituted an understanding or agreement of hiring, and that B. was entitled to recover the reasonable value of services thereafter rendered, notwithstanding the agreement under which the services were originally begun: *Bennett v. Stephens*, 8 Or. 444.

§ 242. **Services of Intruder without Request.**—Services rendered by an intruder and without his request cannot be recovered for.⁴ If one voluntarily puts repairs to the house or fences of another, without consulting the owner, he cannot afterwards charge him therefor.⁵ So a workman employed to do a particular job, who adds extra

¹ *Lange v. Kaiser*, 34 Mich. 317.

² *Wood on Master and Servant*, sec. 62; *Trustees v. Allen*, 14 Mass. 175; *Chiniquy v. Delière*, 37 Ill. 237; *Handy v. Clark*, 4 Houst. 16; *Christie v. Sawyer*, 44 N. H. 298; *De Wolf v. Chicago*, 26 Ill. 443; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Low v. R. R. Co.*, 45 N. H. 370.

³ *Chase v. Corcoran*, 106 Mass. 286.

⁴ *Bartholomew v. Jackson*, 20 Johns. 28; 11 Am. Dec. 237; *Caldwell v.*

Eneas, 2 Mill Const. 348; 12 Am. Dec. 681; *Pinchon v. Delancy*, 2 Yeates, 22. *Allen v. Richmond College*, 41 Mo. 302; *Levee Commissioners v. Harris*, 20 La. Ann. 201; *Watson v. Ledoux*, 8 La. Ann. 68; *Dunbar v. Williams*, 10 Johns. 249; *Fox v. Sloo*, 10 La. Ann. 11; *Morris v. Barnes*, 35 Mo. 412; *Hazlip v. Leggett*, 6 Smedes & M. 326.

⁵ *Caldwell v. Eneas*, 2 Mill Const. 348; 12 Am. Dec. 681.

work without consulting his employer, cannot recover therefor.¹ But where A, supposing himself entitled to an estate of which possession had been taken under an inquisition of escheat, proceeded to an investigation, in the course of which he proved the title of B, who had taken no steps in the matter, and that his own claim was defective, it was held that A should be reimbursed for his expenses in the investigation, and that he be allowed for his services ten per cent on the amount of the estate recovered.²

§ 243. Services Rendered through Duress or Fraud. —

Where one is induced to render services to another either by duress³ or fraud,⁴ he may recover their value, though when he rendered them there was no intention to pay for them. If either servant or master is induced to enter the contract by the fraud or misrepresentation of the other, — the falsity of the representation not being ascertainable by the exercise of ordinary prudence, — he is not bound.⁵ But if he proceeds after discovering it, he waives the fraud, and is bound to perform.⁶ Where a contract was made that A should serve in the army two years as substitute for B, and the substitute was accepted and the service actually performed, it was held no defense in a suit brought for the service money to set up that the substitute deceived the officers of government as to his name, age, etc., by misrepresentation.⁷

ILLUSTRATIONS. — A, fraudulently representing himself to be owner of land, induced B to labor on it in expectation of becoming a joint owner. *Held*, that on discovering the fraud he might sue for and recover pay for his labor: *Richard v. Stanton*, 16 Wend. 25. A was the lessee of a state prison, and employed

¹ *Hort v. Norton*, 1 McCord, 22.

² *City Council v. Hagermeyer*, Riley Ch. 117.

³ *Peter v. Steel*, 3 Yeates, 250; *Jarrot v. Jarrot*, 2 Gilm. 20; *Black v. Meaux*, 4 Dana, 188.

⁴ *Rickard v. Stanton*, 16 Wend. 25.

⁵ *Selway v. Fogg*, 5 Mees. & W. 83; *Huie v. Phelps*, 2 Stark. 480.

⁶ *Campbell v. Fleming*, 1 Ad. & E.

⁷ *Selway v. Fogg*, 5 Mees. & W. 83.

⁸ *Servis v. Cooper*, 33 N. J. L. 68.

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the prisoners to work for him, under a contract with the state, among them B. After his release B proved that he had been illegally committed to prison, and sued A for the value of his services. *Held*, that he could recover: *Patterson v. Crawford*, 12 Ind. 241. A induced a woman to marry him. She lived with him until she found that he was already married, and then left him and brought an action for her services. *Held*, that she could recover: *Higgins v. Breen*, 9 Mo. 497. A woman had lived with a man as his wife, both believing such relation to exist, and upon his death it appeared that the marriage between them was void. *Held*, that there was no implied promise raised entitling her to recover for her services: *Cropsey v. Sweeney*, 27 Barb. 310; 7 Abb. Pr. 129.

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§ 244. **Illegal or Immoral Service.**—No action lies for services rendered in peddling goods for another without license, in violation of law.¹ A recovery for services performed in aid of prostitution, as mistress of a brothel, is not permissible.² A marker at an illicit billiard-table, who keeps the games and receives the money betted by the players, is not entitled to recover wages from the owner of the table, the contract being unlawful.³ One cannot recover for his personal services, portions of which were rendered in an employment of selling liquors unlawfully, the contract of service being an entirety; but he is not prevented from recovering for his services contracted to be rendered in a lawful employment, merely because, during the term of his employment, he occasionally assisted his employer in such unlawful business gratuitously, not expecting or seeking any compensation therefor.⁴ A party who sues to recover for services rendered under an unconstitutional law cannot recover.⁵ But the legislature may ratify such service,⁶ and authorize the payment of a claim created under an unconstitutional law, though by the constitution it has no power to authorize the payment of any claim created without express authority of law.⁷

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¹ *Stewartson v. Lothrop*, 12 Gray, 52.

² *Williams v. Guarde*, 34 Mich. 82.

³ *Badgley v. Beale*, 3 Watts, 263.

⁴ *Goodwin v. Clark*, 65 Me. 280.

⁵ *Meagher v. Storey County*, 5 Nev. 244.

⁶ *Id.*

⁷ *Miller v. Dunn*, 72 Cal. 462; 1 Am. St. Rep. 67.

§ 245. **Request Implies Promise to Pay.**—A request by one of another to do anything for him implies an agreement to pay him what the services are reasonably worth.¹

§ 246. **Exceptions—Request without Benefit to Party.**—But a naked request is not sufficient to make a liability if the service is not for his benefit,² or there is no legal liability on him to have the labor performed. But of course if the terms of the request imply a promise to pay, the liability attaches.³

§ 247. **Services Rendered in Expectation of Bequest or Legacy.**—Where a party renders services for another in the hope of a legacy, and in sole reliance upon the person's generosity, without any contract, express or implied, that compensation should be provided for him by will or otherwise, and the party for whom the services were rendered dies without making such provision, no action lies. But where from the circumstances of the case it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services.⁴ Services in the way of assiduous nursing and attention to a boarder, if performed with the intention of charging additionally for them, furnish a ground of action. But it is otherwise if they were rendered without any such intention, and

¹ *Van Arman v. Byington*, 38 Ill. 443; *Weeks v. Holmes*, 12 Cush. 215; *James v. Bixby*, 11 Mass. 34; *Dougherty v. Whitehead*, 31 Mo. 253; *Lewis v. Trickey*, 20 Barb. 387; *Weston v. Davis*, 24 Me. 374; *Beall v. Van Bibber*, 19 La. Ann. 434. A, when a young girl, entered B's home, a stranger to her, as a servant for a fixed period. For several years after the expiration of that period she continued to work for B without receiving other compensation than a home,

board, and clothing. *Held*, that a promise to pay what her services were reasonably worth was implied; *McMillan v. Page*, 71 Wis. 655.

² *Smith v. Watson*, 14 Vt. 352; *Williams v. Brickell*, 37 Miss. 682; 75 Am. Dec. 88; *Norris v. Dodge*, 23 Ind. 193; *Boyd v. Sappington*, 4 Watts, 217; *Batchelder v. McKenney*, 36 Me. 555.

³ *White v. Mastin*, 38 Ala. 147.

⁴ *Wood on Master and Servant*, see, 72; *Martin v. Wright*, 13 Wend. 460; 23 Am. Dec. 468.

merely with the hope and expectation of being rewarded for them in the boarder's will.¹

§ 248. **Presumption that Services are for Hire.**—Services rendered by one person for another are presumed to have been for hire, and not gratuitous, and this presumption can only be rebutted by evidence of a contrary express or implied understanding.² Where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made by him for a considerable period after such service has terminated, the presumption is either that the wages have been paid, or that the service was gratuitous. This is a presumption of fact, and may be rebutted.³

§ 249. **Exception—Near Relatives.**—An exception to this rule arises where the parties are members of the same family or near relatives.⁴ In this case the law will not imply a promise to pay for services rendered, even though there may be a moral obligation to pay; but clear and satisfactory evidence must be given of an actual

¹ Kennard v. Whitson, 1 Houst. 36.

² Lawson on Presumptive Evidence, 74. But where a service for the benefit of the public is required by law, and no provision for its payment is made, it is regarded as gratuitous, and no claim for compensation can be enforced: Anderson v. Board of Commissioners, 25 Ohio St. 13.

³ McConnell's Appeal, 97 Pa. St. 31.

⁴ Lawson on Presumptive Evidence, 74; In re Scott, 1 Redf. 234; Williams v. Hutchinson, 3 N. Y. 312; 53 Am. Dec. 301; Bowen v. Bowen, 2 Bradf. 336; Houck v. Houck, 99 Pa. St. 552; Carpenter v. Weller, 15 Hun, 134; Adams v. Adams, 23 Ind. 50. In Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301, the court say: "A contract or promise to pay as a matter of fact requires affirmative proof to establish it. Under certain circumstances, when one man labors for another, a presumption of fact will

arise that the person for whom he labors will pay him the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case and the ordinary dealings between man and man. But where the services are rendered between members of the same family, no such presumption will arise. We find other motives than the desire of gain which may prompt the exchange of mutual benefits between them, and hence no right of action will accrue to either party, although the services or benefits received may be very valuable. And this does not so much depend upon an implied contract that the services are to be gratuitous, as upon the absence of any contract or promise that a reward should be paid. So far, then, as it depends upon any presumption of fact, the difficulty is as great or greater in the case of an infant than an adult."

promise by the defendant to pay for such services, or that the circumstances are so strong as to show an intention on his part to do so.¹ Thus a daughter who continues to reside in her father's family after coming of age may recover what her services to him are reasonably worth, if there is a mutual understanding that she shall be paid for such services.² The relationship of father-in-law and son-in-law is not of itself sufficient to rebut the presumption of liability for services rendered by one to the other.³

ILLUSTRATIONS.—A mother, being ill, sent for her daughter, who had a family, to come and care for her. The daughter left her home and lived with and took care of her mother for more than three years, deceased frequently remarking that she should be well rewarded. *Held*, that plaintiff could recover the value of her services: *Markey v. Brewster*, 17 Hun, 16. The plaintiff, after he came of age, lived with and worked for his father, the defendant, who said he would reward him well and provide for him in his will. *Held*, that the plaintiff could not recover compensation for his services during the lifetime of his father: *Patterson v. Patterson*, 13 Johns. 379. A sister resided in her brother's family, performed the usual duties of a housekeeper, and in return received clothing and a home for eight years. No account was kept, and no agreement was made that she should receive wages. *Held*, that the law would not imply a contract for services rendered: *Ayres v. Hull*, 5 Kan. 419. A girl, upon the death of her mother, was turned away from home by her father at the age of fourteen, and at the suggestion of her aunt and her grandmother, she went to live with an uncle and aunt, with whom she remained until she was twenty-five years of age, when she married. She subsequently brought suit against the uncle for work and labor. No express contract to pay her was asserted, and it appeared that she was kindly treated and provided for in a better manner than she would have been if she had merely received ordinary wages. *Held*, that she was not entitled to recover for her services: *Hays v. McConnell*, 42 Ind. 285. A laborer, hired for a certain time and for a certain price, intermarried with his employer's daughter, who was a member of her father's family, and continued to work for his wife's father for several years, the wife in the

¹ *Duffey v. Duffey*, 44 Pa. St. 399; *Guild*, 15 Pick. 129; *Fitch v. Peckham*, 16 Vt. 150.
Bash v. Bash, 9 Pa. St. 260; *Andrus v. Foster*, 17 Vt. 556; *Ridgway v. English*, 22 N. J. L. 409; *Guild v.*

² *Green v. Roberts*, 47 Barb. 521.

³ *Amey's Appeal*, 49 Pa. St. 126.

meanwhile remaining with her father and rendering services for him, and he furnishing her and the children who were the issue of her marriage with food and clothing. There was no agreement made in regard to the services of the daughter, or the food and clothing of herself and her children, or the services of her husband. *Held*, that the father was not liable for the services of his daughter; that he could not claim compensation for the food and clothing of herself and children, and that he was bound to pay her husband what his services were reasonably worth after the time for which he had been engaged had expired: *Conger v. Van Aernum*, 43 Barb. 602. A woman of twenty-five years of age lives for six years with her step-mother, from whom her father had been divorced, working as a dressmaker, and giving some of her earnings to her step-mother, and doing some of the household work. *Held*, that she cannot recover from her step-mother for services rendered: *Feirtag v. Feirtag*, Mich., 1889.

§ 250. **Contract for Certain Term or Certain Thing an Entire Contract.**—A contract to work a certain term or to do a certain thing for a certain sum, either payable in block or in installments, is an entire contract, and unless the full term is served or the thing is completed, the servant can recover nothing.¹ A contract to teach a school for ten months at a given rate per month is entire, and no part of the consideration is payable, or can be recovered, before the end of the term.² An artist who has agreed to paint likenesses for a certain price cannot recover till he has completed them.³ But this is a mere presumption which may be rebutted by any evidence showing a different arrangement between the parties.⁴ Where the

¹ *Jennings v. Lyon*, 39 Wis. 553; 20 Am. Rep. 57; *Kohn v. Fandel*, 29 Minn. 470; *Difenback v. Stark*, 56 Wis. 462; 43 Am. Rep. 719; *Hansell v. Erickson*, 28 Ill. 257; *Union Bank v. Hemyard*, 15 S. C. 296; *Thayer v. Wadsworth*, 19 Pick. 349; *Earp v. Tyler*, 73 Mo. 617; *Reab v. Moor*, 19 Johns. 337; *Freeman v. Galbraith*, Wright, 591; *Isaacs v. McAndrew*, 1 Mont. 437; *Larkin v. Buck*, 11 Ohio St. 561; *Stein v. Rose*, 17 Ohio St. 471. A contract for service, "at a salary of two thousand five hundred dollars per annum," is not a contract

for any definite time, and at a fixed price, the complete performance of which is a condition precedent to a right to compensation. It is but a stipulation of the rates at which the employee is to be compensated for the services performed. He is not bound to serve for any definite time to entitle him to compensation: *Hancy v. Caldwell*, 35 Ark. 156.

² *Turner v. Baker*, 30 Ark. 188.

³ *Freeman v. Galbraith*, Wright, 581.

⁴ *Thayer v. Wadsworth*, 19 Pick. 553; *Hoar v. Clute*, 15 Johns. 224.

servant's whole time is not due under the contract but he is only required to serve when called on, he may, if he holds himself in readiness to perform during the term, recover the agreed compensation for the entire period.¹

ILLUSTRATIONS.—J. agreed that he and wife would work for L. for a year for a gross sum. Four months after the wife, being about to be confined, left the service, and J. was discharged. *Held*, that J. could recover nothing, as his wife's sickness might have been foreseen by him when he made the contract: *Jennings v. Lyons*, 39 Wis. 553; 20 Am. Rep. 57. A brick-layer undertook to lay the brick of a house at two dollars and fifty cents per thousand, kiln count. *Held*, that the compensation was not due until the house was completed; and that the loss arising from the accidental destruction of a part of the work during the progress thereof fell on him: *Shanks v. Griffin*, 14 B. Mon. 153. A carpenter agreed to do the carpenter's work on a house, and was to receive a certain sum on the completion of the work, his employer furnishing the materials; and the house and materials were destroyed by fire without the fault of the carpenter, the house being in possession of the employer. *Held*, that the carpenter could not recover a *pro rata* compensation for the work actually done: *Brumby v. Smith*, 3 Ala. 123. The plaintiff agreed to work for the defendant ten and a half months, and spin yarn "at three cents per run." *Held*, that the contract was entire, and must be performed before the plaintiff could recover for the price of labor; and that, if he left the service of the defendant before the expiration of the time, he could not recover for spinning a certain number of runs of yarn: *McMillan v. Vanderlip*, 12 Johns. 165. An agreement was made that the plaintiff was to work for the defendant "for eight months, for which the defendant was to pay him \$104, or \$13 per month." *Held*, that the contract was entire, and that the plaintiff could not sue for his pay until he had served out the whole time: *Reab v. Moor*, 19 Johns. 337.

§ 251. **Abandonment of Contract—No Recovery for Time Served.**—A servant employed for a term under an entire contract, who abandons and refuses to complete it without legal cause, can recover nothing for what he has done. This rule is laid down in a multitude of decided cases both in this country and in England.² On the

¹ *Thompson v. Society*, 5 Pick. 469; *Jones v. Graham*, 21 Ala. 654; *Bromley v. School District*, 47 Vt. 381.

² *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442; *Lantry v. Parks*, 8 Cow. 63; *Olmstead v. Beale*, 19 Pick. 528,

other hand, in the case of *Britton v. Turner*,¹ which arose in New Hampshire in 1834, it was held that the defaulting servant may recover from the master the value of his services for the time served, less the damages sustained by the master by reason of the partial non-completion of the contract. This doctrine, though since criticised in the court in which it was announced,² remains the law of New Hampshire,³ and has been followed in Iowa,⁴ Kansas,⁵

Davis v. Maxwell, 12 Met. 290; *Brown v. Fitch*, 33 N. J. L. 418; *Bragg v. Bradford*, 33 Vt. 35; *Eldridge v. Rowe*, 2 Gilm. 91; 43 Am. Dec. 41; *Wolfe v. Howes*, 20 N. Y. 197; 75 Am. Dec. 388; *Hogan v. Titlow*, 14 Cal. 255; *Angle v. Hanna*, 22 Ill. 429; 74 Am. Dec. 161; and see cases cited in Wood on Master and Servant, sec. 147, note 1; *Webb v. Duckingfield*, 13 Johns. 389; 7 Am. Dec. 388; *Martin v. Schoenberger*, 8 Watts & S. 367; *Givhan v. Dailey*, 4 Ala. 336; *Gillis v. Space*, 63 Barb. 177; *Larkin v. Buck*, 11 Ohio St. 561; *Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337; *Earp v. Tyler*, 73 Mo. 617; *McMillan v. Vanderlip*, 12 Johns. 165; 7 Am. Dec. 299; *Tipton v. Feitner*, 20 N. Y. 429; *Cunningham v. Morrell*, 10 Johns. 203; 6 Am. Dec. 332; *Jennings v. Camp*, 13 Johns. 94; 7 Am. Dec. 367; *Morrill v. Bemis*, 4 Denio, 121; *Mortmain v. Lefaux*, 6 Mart. (La.) 654; 12 Am. Dec. 485; *Byrd v. Boyd*, 4 McCord, 246; 17 Am. Dec. 740; *Wright v. Turner*, 1 Stew. 29; 18 Am. Dec. 35; *Posey v. Garth*, 7 Mo. 94; 37 Am. Dec. 183; *Henson v. Hampton*, 32 Mo. 410; *Schnerr v. Lemp*, 19 Mo. 42; *Millar v. Goddard*, 34 Me. 102; 56 Am. Dec. 638; *Swanzey v. Moore*, 22 Ill. 63; 74 Am. Dec. 134; *Nelichka v. Eslerly*, 29 Minn. 146.

¹ 6 N. H. 481; 26 Am. Dec. 713.

² *Davis v. Barrington*, 30 N. H. 517.

³ *Davis v. Barrington*, 30 N. H. 517.

⁴ *McClay v. Hedge*, 18 Iowa, 66; *Pixler v. Nichols*, 8 Iowa, 106; 74 Am. Dec. 298; *Byerlee v. Mendel*, 39 Iowa, 382.

⁵ *Duncan v. Baker*, 21 Kan. 107. In this case the court say: "The weight of authority at the present time we think is unquestionably against the doctrine that where a contract is entire, and

consequently not apportionable, and has been only partially performed, the failing party is not entitled to recover or receive anything for what he has actually done. It will, perhaps, be admitted that such doctrine has been overturned with respect to all contracts except those for personal services; and if so, then there is not much of the doctrine left. But if the doctrine is to be abandoned with reference to all contracts except those for personal services, then why not abandon the doctrine altogether? The reason usually given is, that the employer in contracts for personal services has no choice, except to accept, receive, and retain the services already performed; while in other contracts he may refuse to accept, or may return the proceeds of the partially performed contract if he chooses. But this is not always nor even generally true with respect to other contracts. Suppose a miller purchase a thousand bushels of wheat for a thousand dollars, the wheat to be delivered within one month; he receives the wheat as it is delivered and grinds it into flour; when the vendor has delivered five hundred bushels thereof he refuses to deliver any more; what choice has the miller then except to retain what he has already received? This kind of supposition will also apply to the purchase and sale of all other kinds of articles where the purchaser on receiving them changes their character or sells them, so that he cannot return them. Or suppose that an owner of real estate employs a man to build or repair some structure thereon for a gross but definite sum, the owner of the real estate to furnish the materials or a portion thereof in case of building, and either party to furnish them in case of re-

Nebraska,¹ and several more states, as will be seen by the cases cited below.²

§ 252. **Exceptions—When Quantum Meruit Recoverable.**—And there are certain cases where a *quantum meruit* may be recovered before the end of the term. These cases are: 1. Where before the end of the term the master abandons the business;³ 2. Where before the end of the term the servant is wrongfully dismissed;⁴ 3. Where complete performance is prevented by the act of God—as sickness or death⁵—or by the act of the

pairing, and the job is only half finished, what choice has the owner of the real estate with reference to retaining or returning the proceeds of the workman's labor? This kind of supposition will also apply to all kinds of work done on real estate, and will often apply to work done on personal property. Of course in all cases where the employer can refuse to accept the work, and does refuse to accept it, or returns it, he is not bound to pay for it, unless it exactly corresponds with the contract. But where he receives it and retains it, whether he retains it from choice or from necessity, he is bound to pay for the same what it is reasonably worth, less any damage that he may sustain by reason of the partial non-fulfillment of the contract. Of course he is not bound to pay anything unless the work is worth something, unless he receives or may receive some actual benefit therefrom; and where he receives or may receive some actual benefit therefrom, he is bound to pay for such benefit, and only for such benefit, within the limitations hereinbefore mentioned."

¹ McMillan v. Malloy, 10 Cent. L. J. 447; Purcell v. McComber, 11 Neb. 209; 38 Am. Rep. 366.

² Coe v. Smith, 4 Ind. 79; 58 Am. Dec. 618; Wolcott v. Yeager, 11 Ind. 84; Carroll v. Welch, 26 Tex. 147; Riggs v. Horde, 25 Tex. Supp. 456; 78 Am. Dec. 584; Chamblee v. Baker, 95 N. C. 98; Hollis v. Chapman, 36 Tex. 1.

³ Fuller v. Rowe, 59 Barb. 344.

⁴ Hill v. Green, 4 Pick. 114; Brinkley

v. Swicegood, 65 N. C. 626; Byrd v. Boyd, 4 McCord, 246; 17 Am. Dec. 740; Swift v. Harriman, 30 Vt. 697; Libhart v. Wood, 1 Watts & S. 265; 37 Am. Dec. 461; Henderson v. Stiles, 14 Ga. 135; Ryan v. Dayton, 25 Conn. 188; 65 Am. Dec. 560.

⁵ Wolfe v. Hawes, 20 N. Y. 197; 75 Am. Dec. 388; Clark v. Gilbert, 26 N. Y. 279; 84 Am. Dec. 189; Jarrell v. Farris, 6 Mo. 159; Lewington v. Greene, 7 R. I. 589; Cuckson v. Stones, 28 L. J. Q. B. 25; Ryan v. Dayton, 25 Conn. 188; 65 Am. Dec. 560; Lakeman v. Pollard, 43 Me. 463; 69 Am. Dec. 77. In K. v. Raschen, 38 L. T., N. S., 38, the plaintiff was engaged by the defendants as a clerk at a yearly salary, and was to have one month's notice of dismissal. He served under the contract from the 21 to the 30th of July, when, being unwell, he obtained defendants' permission to absent himself until the 6th of August. He remained away, however, until the first week in September, when he returned and tendered his services, which the defendants refused; and they had, moreover, in the mean time, namely, on the 20th of August, given him a notice by letter of that date, terminating the employment. They refused to pay him the amount claimed by him for wages during his absence, on the ground that he had, by his own misconduct, rendered himself incapable of performing his duties, and therefore was not entitled to any remuneration. The illness under which the plaintiff was suffering arose from venereal disease. He thereupon

law.¹ So a master waives forfeiture of wages for services performed by a servant who voluntarily leaves before the

brought an action for his wages from the 1st of August to the 1st of September, but was nonsuited in the court below. On appeal the nonsuit was set aside and a verdict entered for the plaintiff. Cleasby, B., said: "I think *prima facie* illness is to be attributed to the act of God, and we are not justified in going back for any length of time, and entering into an investigation as to what may have been the cause of it. We ought not, I think, to extend the effect of disability arising from illness. The illness which rendered him unable to perform the duties for a time came upon him unexpectedly, and we cannot go back to the first causes and into the question of how it arose. The maxim, *Causa proxima non remota spectatur*, is applicable here. As to how precisely the disease arose, there may be various different opinions, and there might be the greatest uncertainty as to the cause or matter which originally brought it about. It was a misfortune which could not have been foreseen at the time the contract was made, and I think the plaintiff is entitled to say that it is a reasonable excuse for his duties." Hawkins, J.: "I am of the same opinion. If the plaintiff had been aware, at the time of the making of the contract, that he would be incapacitated by illness from performing his duties, I am not prepared to say that he could recover in this action. But there is nothing to show that he knew anything of the illness which he subsequently suffered from until after the agreement had been entered into. There was no cross-examination on that point, and no question was put to get out of him, and there was no evidence to show, that he had any suspicion of the misfortune which subsequently overtook him, or that he was aware that the seeds of the disease existed in him at that time. Now, I base my opinion upon that fact, and I think, under these circumstances, that he is entitled to the amount claimed. The misconduct alleged in the pleadings is his staying away with-

out a reasonable excuse. How can it be called misconduct if a man stays away, on the advice of a doctor, in order to get himself cured? Now, in the present case, the plaintiff did not voluntarily and willfully refuse to serve, but was compelled to absent himself by an illness which came upon him during the time of service, and which was not the result of any misconduct that occurred after the agreement was made. As a matter of fact, I conclude that the malady was contracted before he entered into the defendants' service, and he did not improperly obtain admission there. At the time that he entered into the contract, which he did honestly, he neither believed nor knew that he would not be able to fulfill it." Disability occasioned by temporary sickness will not disentitle a servant to wages, if the contract be treated as subsisting throughout: Cuckson v. Stones, 1 El. & E. 248; 28 L. J. Q. B. 25; 32 L. T. 242. Of course, it is one thing as regards wages accruing up to the time of the sickness, and another as regards wages for the period during or subsequent to the sickness; and as to the latter period, it is important to bear in mind the proviso italicized above. The Scotch law on this branch of the subject seems in some particulars more favorable to servants than our own. If the sickness be caused by a hurt sustained while engaged in the master's service, — e. g., by a kick from his horse, or the bursting of his fowling-piece, — the servant is entitled to full wages; and if he lived in the family, to board wages up to the period of the termination of the contract: Bell's Commentaries, 179; Lorimer's Institutes, sc. 564. If the master offer to maintain the servant in his own house, the servant in the general case is not entitled to leave and claim board wages; but if it be found necessary for his recovery that he should be removed, the master must pay board wages: 2 Hutch. Just. 167; Fraser on Master and Servant, 51. If the servant's sickness has arisen from over-

¹ Jones v. Judd, 4 N. Y. 411.

term of service has expired, and is liable therefor at the rate stipulated by the contract only, but without deduction of damages sustained by the leaving, where he offers to pay the servant at the contract price, and tenders payment, although by mistake he tenders less than the amount due at that rate, and although he insists at the time that he did not admit his liability.¹

§ 253. **Hours of Labor.**—A servant hired by the month or year cannot be compelled to work an unreasonable number of hours each day; but what is or is not reasonable depends upon the nature of the business, the custom of the trade and the regulations of the employer, and the understanding of the parties when the contract was made.² Where a party contracts to work by the week, knowing the nature of the employment to be such as will occupy all his waking hours, he cannot claim compensation for as many days' work as the number of hours of labor performed by him would have amounted to, independent of the contract.³ The fact that a charge for a certain number of hours' services for the first year is assented to by the employer does not create an implied obligation on his part to pay twice as much the second year because the number of hours are doubled in the

tasking, the same principles are applicable: Lorimer's Institutes, sec. 565. If, however, the sickness be referable to no cause which the master could possibly have controlled, the rule is, that wages and board wages will be due only where the illness is of moderate duration; and a deduction from these will be made if the length of the sickness be very great, considered in relation to the length of the engagement: 2 Hutch. Just. 166; Bell's Commentaries, 180; Fraser on Master and Servant, 51. Workmen earning weekly wages, and not residing in the master's house, have no claim against the master if they have been disabled by sickness from discharging duty; and neither does such exist in the case of

any other class of servants, if their engagement be liable to come to an end at a moment's notice; but it is said that where mechanics or artisans are engaged for a lengthened period, they will probably be found to have the same claim to wages (not, of course, to board wages) during sickness of moderate duration as domestic servants: Fraser on Master and Servant, 54; Lorimer's Institutes, secs. 572, 573. See article on Inability of Servants to Fulfill Contracts with Masters, reprinted in 9 Cent. L. J. 174.

¹ *Patnote v. Sanders*, 41 Vt. 66; 93 Am. Dec. 564.

² *Wood on Master and Servant*, sec. 86.

³ *Luske v. Hotchkiss*, 37 Conn. 219; 9 Am. Rep. 314.

latter.¹ But if by statute a certain number of hours are fixed as a day's work, a servant may lawfully refuse to work beyond that time.² Because the compensation for performing the duties of a certain office is fixed at a certain price per day, it is not dependent upon the performance of work on each day.³

§ 254. **Extra Hours — Compensation not Recoverable for Working Extra Hours — Exceptions.** — But unless there is an express promise to pay him, a servant employed for a term cannot recover for working extra hours.⁴ His remedy, it is said, is to refuse to work the extra time.⁵ Even where a statute declares that a certain number of hours shall constitute a day's work, a servant who works over that time cannot recover extra compensation.⁶ But a servant may recover for extra services performed at the request of the master,⁷ provided the service is one the servant is under no legal obligation to perform.⁸ Where a person contracts to serve half the time and to receive but half pay, he may show that he served all the time, and recover at the rate stipulated for in the writing.⁹

ILLUSTRATIONS. — W. was employed by D. as a man-of-all-work, at a fixed weekly stipend; during the sickness of the latter he took care of him alternate nights and alternate Sundays, receiving pay for his services upon Sunday, but none for those rendered at night, nor was there any agreement respecting them. W. having recovered for the extra services at night in the court below, *held*, that the verdict should not be disturbed: *Wilford v. Devin*, 43 Iowa, 559.

¹ *Miller v. Hooper*, 7 Hun, 200.

² *McCarthy v. Mayor*, 96 N. Y. 1; 48 Am. Rep. 601.

³ *Abbott v. Georgia and North Carolina R. R. Co.*, 90 N. C. 462.

⁴ *Fraser v. United States*, 16 Ct. of Cl. 187; *Guthrie v. Merrill*, 4 Kan. 157; *Luske v. Hotchkiss*, 37 Conn. 219; 9 Am. Rep. 314.

⁵ *Wood on Master and Servant*, sec. 86; *Kopitz v. Powell*, 56 Wis. 671, holding that if a servant voluntarily works during unseasonable hours, he

cannot claim extra compensation beyond that called for by his contract with his employer.

⁶ *McCarthy v. Mayor*, 96 N. Y. 1; 48 Am. Rep. 601; *Luske v. Hotchkiss*, 37 Conn. 219; 9 Am. Rep. 314; *United States v. Martin*, 94 U. S. 400.

⁷ *Railroad Co. v. Clarkson*, 7 Ind. 595; *Duncan v. Commissioners*, 19 Ind. 154; *Clutterbuck v. Coffin*, 20 L. J. Com. P. 65.

⁸ *Harris v. Carter*, 3 El. & B. 559.

⁹ *Edrington v. Leach*, 34 Tex. 285.

§ 255. **Work Performed on Sunday.**—As we have seen, a servant is not obliged to work on Sunday,¹ but if he does so, he is not entitled to extra pay,² unless the work is "necessary," and the master requested him to work on that day, and promised to pay him extra compensation.³ Where one is employed at a certain price per month to work on a farm, and his employment contemplates certain work to be done by him on Sunday, and he afterwards makes a final settlement without claiming additional pay for his Sunday work, he cannot then recover for such work.⁴

§ 256. **Right to Order Servant to Different Employment—Compensation.**—A servant hired for one service may refuse to labor at another and different service.⁵ But the test always is, Is the new service such a one as may fairly be contemplated to have been within the intention of the hiring.⁶ "If," says Mr. Wood,⁷ "a farm laborer should refuse to carry mortar for brick-layers constructing a building for the master, he might properly be dismissed therefor, for the nature of the service is general.⁸ But if the same service was required of a clerk, a book-keeper, lawyer's clerk, and others specially employed, he might properly refuse to perform it. Thus a lady's maid cannot be required to milk cows,⁹ a journeyman saddler cannot be required to cook,¹⁰ nor a cook to act as market-woman,¹¹ nor a farm laborer as a household servant.¹² But

¹ *Commonwealth v. St. Germain*, 1 Browne, 24, cited *ante*. A contract to pay a demurrage will, in the absence of any proof to the contrary, be deemed to intend to mean demurrage for working days, and to exclude Sundays: *Rigney v. White*, 4 Daly, 400.

² *Guthrie v. Merrill*, 4 Kan. 187.

³ *Whitcomb v. Gilman*, 35 Vt. 297.

⁴ *Lowe v. Marlow*, 4 Ill. App. 420.

⁵ *Baron v. Placide*, 7 La. Ann. 229.

⁶ *Angle v. Hanna*, 22 Ill. 429; 74 Am. Dec. 161; *Burton v. Pinkerton*, L. R. 2 Ex. 340.

⁷ *Wood on Master and Servant*, sec. 89.

⁸ *Angle v. Hanna*, 22 Ill. 429; 74 Am. Dec. 161; *Freeman v. Master and Servant*, 68.

⁹ *Bell's Commentaries*, 117.

¹⁰ *Peter v. Terrol*, 2 Mur. 28.

¹¹ *Gunn v. Ramsay*, Hume, 384.

¹² *Stuart v. Richardson*, Hume, 390. A director of a theater cannot require a dancing-girl, engaged as *première seconde danseuse*, to appear in any dances which do not enter into employment according to the usages of the thea-

in all cases this question, as to whether certain special service outside of the contract can be reasonably required of the servant, must depend upon the contract and the character of the service contemplated thereby, and the particular necessities of the master." One agreeing to render service as "salesman," or in any other capacity, may show by the usages of this trade what services he was to render, where his work was to be done, what goods he was to sell, and how many hours a day he was to be employed.¹ Thus, engaged as a "lace buyer," he might show that an order from his employer to fold some lace on cards was not within his contract, and that his refusal to do so would not justify his dismissal;² or engaged as a traveling salesman, and agreeing not to go over "the same ground" for any other house, these words ought to be properly explained by parol evidence of usage;³ and usage may explain what is included in "ship-carpenters' work," as these words are used in a contract.⁴ But the master may call for his assistance outside of his ordinary engagement in a case of great emergency.⁵

§ 257. **Increased Duties — Extra Compensation.** — So a person, employed at a salary to perform certain duties, cannot recover extra pay because his duties have been increased beyond what he expected.⁶ An action does not lie

ter. And where he dismisses her for refusing to dance a parlor-dance in parlor-dress with the *figurantes* of the theater, he will be liable to her in damages: *Baron v. Placide*, 7 La. Ann. 229.

¹ *Hagan v. Domestic Sewing Machine Co.*, 9 Hun, 73; *Sweet v. Lee*, 3 Man. & G. 452; *Price v. Mouat*, 11 Com. B., N. S., 509; *Hosley v. Black*, 28 N. Y. 438.

² *Price v. Mouat*, 11 Com. B., N. S., 509.

³ *Mumford v. Gething*, 7 Com. B., N. S., 305.

⁴ *Collyer v. Collins*, 17 Abb. Pr. 467.

⁵ *Wood on Master and Servant*, sec. 89.

⁶ *Fraser v. United States*, 16 Ct. of Cl. 337; *Turnell's Succession*, 34 La. Ann. 888; *Hair v. Bell*, 6 Vt. 55; *Kopitz v. Powell*, 56 Wis. 671; *Hodges v. Railroad Co.*, 29 Vt. 220; *Few v. National Bank*, 130 Mass. 394. "A person employed as the secretary of a private corporation, at a fixed rate of compensation, cannot demand extra pay for services in that capacity which were not anticipated at the time of his appointment, or which were not enumerated in the charter or by-laws. The fair construction of his contract is, that he will do whatever his employers may have occasion to employ a secretary about": *Black, J.*, in *Carr v. Chartiers Coal Co.*, 25 Pa. St. 337. In *Voorhees*

on a promise to pay for services which it was the plaintiff's duty to perform without pay.¹ But a person employed on a particular service, or by the month or year, may have a right to compensation for services rendered on request, out of the range of such employment, even without express

v. Combs, 33 N. J. L. 494, a domestic servant was employed by one W., at a stipulated monthly wage. After W.'s death she claimed an increased compensation, on the ground that her labors had been increased by his sickness. It was held that she could not recover. "The presumption of law," said the court, "is, that for all services rendered by her to her employer, which are in the line of her regular duties, or of a similar nature, whether ordinary or extraordinary, she is satisfied by the payment of her fixed salary. The object of an express contract is to guard the parties against uncertainty as to its term, or exaction in its performance. But an express contract will furnish slender protection indeed to the master, if for every additional or extra service he may be subjected to the payment of such sum as a jury may award. Such a rule would give the servant a valid claim for increased pay whenever the master entertained an unexpected guest, and enable the clerk at a fixed salary to demand an increase of wages with every increase of the merchant's business. No reason can be perceived why the master might not, with equal propriety, upon the mere diminution of the servant's labor, reduce the remuneration. The doctrine upon which the plaintiff rests her case is contrary to the well-settled rule that an express contract excludes an implied one. An implied contract cannot exist when there is an existing express contract about the identical subject. The parties are bound by their agreement, and there is no ground for implying a promise. It is only when the parties do not agree that the law interposes and raises a promise. Where an express contract exists, there must be a rescission of it before the parties will be remitted to the contract which the law implies, in the absence of that

agreement which they make for themselves: *Walker v. Brown*, 28 Ill. 378; 81 Am. Dec. 287; *Cutler v. Powell*, 6 Term Rep. 324; *Hart v. Lauman*, 29 Barb. 410. In the case of *Hart v. Lauman*, Hart agreed to make a certain excavation of earth for a special price. After he entered on the work, he, unexpectedly to both parties, encountered hard-pan, and gave notice to Lauman that he must abandon the work unless Lauman would allow him more than the contract price. Lauman told Hart to quit the work until some arrangement could be made, and he did quit it for about two weeks, when it was resumed under a new agreement, by which he was to have reasonable compensation for the work. It was held in this case that Hart could not recover under the new agreement, unless what took place between the parties in effect rescinded the original contract as to that portion of the work which had been abandoned, and that the parties were not in a situation to make a new contract binding upon them until such rescission. In other words, that where work was entered upon with an express stipulation as to price, a subsequent express promise to pay a greater sum on account of unforeseen difficulties in the undertaking, would be void for want of consideration to support it, unless it was accompanied by a virtual rescission of the original bargain. The extra services of the plaintiff were not rendered in an employment different from that for which she engaged, but were more burdensome by reason of the testator's illness. In the absence of the express agreement to pay for the extra services, no recovery can be had. This view is supported by *Carey v. Halleck*, 9 Cal. 198; *Haymore v. Moore*, 8 Ohio, 239; *Smith on Master and Servant*, 101, and *Hart v. Lauman*, before cited."

¹ *Sweany v. Hunter*, 1 Murph. 181.

agreement that such services shall be paid for.¹ Where a person employs an architect to prepare working drawings for a house, and the architect changes the plan, if the owner directs the work to be altered to conform to the original plan, he must pay the workman for such alteration.² Where extra labor performed is of the same character as other labor agreed for, and the price specified, it will be inferred that the additional work is to be paid for at the same rate.³ Usage is admissible to settle a question as to the proper performance of the duties of a particular service.⁴ Where the plaintiffs, who were booksellers, employed the defendant, a printer, to print for them an edition of one thousand copies of a book called "Taylor's Holy Living," but the latter printed fifteen hundred copies, delivering them one thousand and disposing of the remainder to his own use, it was held, in an action brought by them for damage caused by the market being thus overstocked, that it was a proper subject of testimony to show that, according to the usage among printers and booksellers, a printer contracting to print for a bookseller a certain number of copies of any work is not at liberty to print from the same type, while standing, an extra number for his own disposal.⁵ So, also, it is competent to prove a custom that the employment of an architect to make plans and designs for a building carries with it an employment to superintend its construction.⁶ A custom for authors having a book to write to employ others to aid them in compiling it, and that such fact being known would not damage their reputation, is admissible.⁷

ILLUSTRATIONS.—The supervising architect of the treasury department was suspended pending the trial of an indictment

¹ *Cincinnati etc. R. R. Co. v. Clark-son*, 7 Ind. 595.

² *Guerin v. Rodwell*, 37 N. J. L. 71.

³ *Chicago etc. R. R. Co. v. Vosburgh*, 45 Ill. 311.

⁴ *Holcroft v. Barber*, 1 Car. & K. 4; *Vaughn v. Gardner*, 7 B. Mon. 326; S., 9.

Hunt v. Carlisle, 1 Gray, 257; *Martin v. Hilton*, 9 Met. 371; *Hunt v. Mickey*, 12 Met. 349.

⁵ *Williams v. Gilman*, 3 Me. 276.

⁶ *Wilson v. Bauman*, 80 Ill. 493.

⁷ *Reade v. Sweetzer*, 6 Abb. Pr., N. S., 9.

against him, and A, who was then superintending the construction of a new building for the department, and who was under pay at the rate of eight dollars per day, was directed to take charge of the office. The supervising architect afterwards returned to duty, and received the amount of his salary during the period of his absence. *Held*, that A was entitled to no pay for his services beyond his eight dollars per day: *Fraser v. United States*, 16 Ct. of Cl. 507. The plaintiff entered into a contract with defendant to draw, for the latter, plans of a house. The contract was afterwards changed so that plaintiff was to furnish plans for a house of greater value than the first, and no specific sum was named for the plans. *Held*, that the plaintiff might prove the value of the plans furnished, and that other services rendered were not included in furnishing the plans, and the value of such additional services: *Marcotte v. Beaupre*, 15 Minn. 152. The contractor of a large tunnel employed another at certain stipulated wages to plan a crib and other means of accomplishing certain difficult parts of the work, and afterwards employed him to superintend the putting down of the crib and otherwise apply his plans to the execution of the work, which he did, inventing and applying thereto "screw-anchors," etc. *Held*, that he might recover of the contractor additional compensation for the latter services, although receiving wages for the time he was therein employed: *Dull v. Bramhall*, 49 Ill. 364.

§ 258. **Contract is Personal—Delegation.**—The contract of service is personal. The master cannot turn over the servant to another master,¹ nor can the servant substitute another in his place and stead,² except, of course, by the consent of the master and servant respectively.³

§ 259. **Lost Time.**—The term of the service being ended, the servant cannot be compelled to continue serving to make up lost time; nor can the master be compelled to receive the extra labor of the servant to make it up, but he has a right to deduct for the lost time.⁴

ILLUSTRATIONS.—Privates on the capitol police remained absent without leave and without reasonable cause. They were not dismissed, but substitutes were employed, who were paid,

¹ *McGuire v. O'Hallaran*, Hill & D. 86.

² *Fenton v. Clark*, 11 Vt. 557; *Campbell v. Price*, 9 Ses. Cas. S. 264.

³ *Cummings v. Elaisdell*, 43 Vt. 382.

⁴ *Prentiss v. Ledyard*, 28 Wis. 131; *Bast v. Byrne*, 51 Wis. 531; 37 Am. Rep. 841; *Nichols v. Coolahan*, 10 Met. 449; *McDonald v. Montague*, 30 Vt. 357.

the names of the absentees being stricken from the pay-roll. They were afterwards restored, and sought to recover their pay during the time of their absence, on the ground that they had not been dismissed. *Held*, that they could not maintain their claim: *Thwing v. United States*, 16 Ct. of Cl. 13. A clerk in the office of the board of education of New York City wrote to the secretary that an operation was about to be performed on his eyes, and asking leave of absence until his sight was restored. Such leave was granted by the board. Before his return a second operation was undergone, which necessitated a departure to Europe. *Held*, that he was not entitled to any salary during the period of his absence in Europe, he not having obtained distinct formal leave of the board therefor. Mere permission of members thereof was insufficient: *O'Leary v. New York Board of Education*, 9 Daly, 161.

§ 260. General Hiring—Prima Facie for What Term.

—In England a general hiring—that is, a hiring where no term is fixed—is a hiring for a year. This rule applies to all kinds of servants, domestic or others, except where there is a different general custom proved, or the intention of the parties is shown to have been different, either by their agreement or the circumstances of the case.¹ In the United States, on the contrary, a general and indefinite hiring is *prima facie* a hiring at will, though the servant is to be paid by the day, week, month, or year, as the case may be.² Unlimited con-

¹ Wood on Master and Servant, sec. 136.

² *De Briar v. Minturn*, 1 Cal. 450; *Tatterson v. Mfg. Co.*, 106 Mass. 56; *Franklin etc. Co. v. Harris*, 24 Mich. 115; *Haney v. Caldwell*, 35 Ark. 156; *Orr v. Ward*, 73 Ill. 318; *Kansas Pac. R. R. Co. v. Roberson*, 3 Col. 142; *Boogher v. Ins. Co.*, 8 Mo. App. 533. In *Hathaway v. Bennett*, 10 N. Y. 108, 61 Am. Dec. 739, the court say: "The plaintiff's counsel has referred us to the English law, by which a servant is entitled to one month's notice before he is discharged; but that rule rests entirely upon custom. Little-dale, J., said in *Williams v. Byrne*, 2 Nev. & P. 139: 'The case of a menial servant has been put, who may be dis-

charged at a month's notice, but that is not a matter of law: it is a custom that might be put on the record as a fact, and the jury would find that it existed.' And in that case the court held that the month's notice was not applicable to a reporter for a newspaper, no such custom being proved applicable to reporters. And in *Fawcett v. Cash*, 5 Barn. & Adol. 904, the court held it was not applicable to a warehouseman who was dismissed from his employment; and in *Beeston v. Collyer*, 4 Bing. 309, it was held not to be applicable to clerks or servants in husbandry. All these decisions were made on the ground that no custom as to such classes of persons had been proved."

tracts for personal service may be terminated by either party upon reasonable notice.¹ A servant employed at will may be discharged at any time.² "The reservation of wages, payable monthly or weekly, will not control the contract so as to destroy its entirety when the parties have expressly agreed for a specified time, as a year. But if the payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week."³ A general engagement of a servant "at a salary of fifteen hundred dollars a year, payable weekly," unaffected by any other considerations growing out of the custom of the place, the conduct of the parties, or other extraneous evidence, disclosing a contrary intention, constitutes a contract of hiring for the year.⁴ A general hiring to be terminated by three months' notice is a hiring by the year.⁵ Where one is hired by the week, and is paid weekly, the burden is on him to show a change in the contract as to the term of service.⁶ On the question as to the term for which a servant is hired, evidence of the terms for which other employees of the same master were hired is irrelevant.⁷ Under an ordinary contract of hiring by the day, the person hired is not bound to prolong his services in order to complete any particular piece of work on which he may happen to be employed.⁸ By the common and legal construction of a contract for the labor of an individual at a monthly compensation, such compensation is payable at the end of each month.⁹ Usage may regulate the conditions of

¹ Ward v. Ruckman, 34 Barb. 419.

² Parks v. Atlanta, 76 Ga. 828.

³ Beach v. Mullin, 34 N. J. L. 343. The fact that the rate of compensation agreed upon is a certain sum per month or per year does not, in the absence of other evidence, fix the period of hiring at one month or one year: Evans v. St. Louis, Iron Mountain etc. R'y Co., 24 Mo. App. 114.

⁴ Bleeker v. Johnson, 51 How. Pr. 380.

⁵ Heidleberg v. Lynn, 5 Whart. 430; 34 Am. Dec. 566.

⁶ State v. Fisher Varnish Co., 43 N. J. L. 151.

⁷ Lakeman v. Pollard, 43 Me. 463; 69 Am. Dec. 77.

⁸ Wyngert v. Norton, 4 Mich. 286.

⁹ Heim v. Wolf, 1 E. D. Smith, 70.

the employee's service. Thus it may be admissible to show the length of a hiring¹ when there is no express agreement as to the time the servant is to work.² A usage is admissible between the printers and proprietors of newspapers that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks' wages.³ In an action for a wrongful dismissal, evidence of a custom among dry goods jobbers in Baltimore that when a clerk or salesman begins a season without a special contract he cannot be dismissed till the end of it, and that the seasons are two,—one from January 1st to July 1st, and the other from July 1st to January 1st,—was admitted.⁴ A custom allowing employees to work for themselves after certain hours is reasonable;⁵ so is a usage on the part of business houses to furnish each other's clerks with goods and charge them to each other.⁶

ILLUSTRATIONS.—One was under monthly employment, and told his employer that he wished it more permanent, and an amount per year was agreed upon, payable semi-monthly. *Held*, that a hiring for a year might be inferred: *Bascom v. Shillito*, 37 Ohio St. 431. A. was employed by M. & C. as a traveling salesman at eighteen hundred dollars "per year," and notified M. that he would make no engagement for less than a year. During the year M. bought out C.'s interest in the partnership. A. served one year satisfactorily. A few months later he was discharged without cause. *Held*, that the contract was a continuing one, to be terminated at the end of each year by the wish of either party, and that A. could recover the entire salary for the second year: *Alba v. Moriarty*, 36 La. Ann. 680. A agreed to work for B for a year, and for a second year at an advanced rate if B should continue in the business. *Held*, that if B continued with a partner he continued in business within the meaning of the contract: *Collett v. Smith*, 143 Mass. 473. An offer by letter to appoint plaintiff superintendent of defendant's ships at a certain sum per month said, "And if you give me satisfac-

¹ *The Swallow*, *Olcott (Admiralty)*, 334; *Harris v. Nicholas*, 5 Munt. 483.

² *Gleason v. Walsh*, 43 Me. 397; *Holcroft v. Barber*, 1 Car. & K. 4.

³ *Cunningham v. Fonblanque*, 6 Car. & P. 44.

⁴ *Given v. Charron*, 15 Md. 502.

⁵ *Barnes v. Ingalls*, 39 Ala. 193.

⁶ *Cameron v. Blackman*, 39 Mich. 108.

tion at the end of the first year, I will increase your salary accordingly." *Held*, a contract of hiring for a year: *Morton v. Cowell*, 65 Md. 359; 57 Am. Rep. 331.

§ 261. Continuance of Service after Expiration of Term—Presumption.—Where without any new contract the servant continues after the expiration of the term, the presumption is, that it is continued on the same terms,¹ but the employment it seems must be in the same business,² and it has been held that where a party enters another's service without any agreement as to the rate of compensation, but subsequently the rate for a term is fixed by agreement, his continuing to serve after that time will not raise a presumption that the compensation is to continue at the same rate.³

ILLUSTRATIONS.—Plaintiff, as a physician, was employed for a year at a fixed salary, to render professional services for a county, and at the end of the year, no successor being then appointed, no new contract being made with him, and no notice given by him that he should demand a different rate of compensation, he continued to render the same kind of services for several months, and until another physician had been appointed and qualified as his successor. *Held*, that he could recover for such additional period of service only at the rate of compensation fixed by his contract of the previous year: *Weise v. Milwaukee County Supervisors*, 51 Wis. 564.

§ 262. Regulations of Master.—Regulations of the master as to the conditions of the service are binding on the servant, if reasonable,⁴ and if known to him.⁵ But such regulations are not binding on a minor.⁶ Such regulations as the following have been had valid, viz.:

¹ *Nicholson v. Patchin*, 5 Cal. 474; *Huntingdon v. Claffin*, 38 N. Y. 182; *Weise v. Supervisors*, 51 Wis. 564; *Iron Co. v. Richardson*, 5 N. H. 294; *Wallace v. Floyd*, 29 Pa. St. 184; 72 Am. Dec. 620; *Ranck v. Albright*, 36 Pa. St. 371; *Grover etc. R. R. Co. v. Bulkley*, 48 Ill. 189.
² *Ranck v. Albright*, 36 Pa. St. 367.
³ *Smith v. Velie*, 60 N. Y. 106.
⁴ *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447; 58 Am. Dec. 718. A regulation or a contract by which the employee releases the master from all liability for damage resulting from the employee's negligence is void: *Roesner v. Herman*, 10 Biss. 486.
⁵ *Stevens v. Reeves*, 9 Pick. 198; *Collins v. Iron Co.*, 115 Mass. 23; *Bradly v. Mfg. Co.*, N. H. 487.
⁶ *Derocher v. Continental Mills*, 58 Me. 217; 4 Am. Rep. 286.

that an employee must give notice of his intention to leave, or forfeit the wages earned.¹ But sickness or the act of the law will excuse the notice,² unless he has expressly agreed to give notice in such case.³ A mere temporary absence is not an abandonment.⁴ And an employee who overstays his leave of absence does not abandon his place.⁵

ILLUSTRATIONS.—The wages of workmen were ascertained on Thursday, but not paid until Saturday; a workman worked from Thursday to Thursday, and left on Friday. *Held*, that he forfeited his wages for the week: *Walsh v. Walley*, L. R. 9 Q. B. 367. An employer was authorized to keep back part of the servant's wages until the work was performed to his "entire satisfaction." The master wrongfully discharged him. *Held*, that no part of his wages could be withheld under the pretense that his work was not satisfactory: *Sloan v. Hayden*, 110 Mass. 141.

§ 263. **Duty to Keep Master's Secrets.**—When a party who has a secret in trade employs persons under a contract express or implied, or under a duty express or implied, those persons cannot gain the secret and then set it up against the employer.⁶ The servant may be re-

¹ *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447; 58 Am. Dec. 718; *Hunt v. Otis*, 4 Met. 464; *Pottsville Iron and Steel Co. v. Good*, 116 Pa. St. 385; 2 Am. St. Rep. 614. A master who notifies his servant that on the next day he shall cut down his wages, whereupon the servant leaves at once, cannot avail himself of a rule that servants leaving without giving two weeks' notice forfeit their wages: *Schietenger v. Bridgeport Knife Co.*, 54 Conn. 64. The amount of forfeiture must not be excessive: *Richardson v. Woehler*, 26 Mich. 90. A clause in a contract that on the failure to give two weeks' notice of intention to quit he shall forfeit "whatever may be due at the time of leaving" is void for unreasonableness: *Schimpf v. Tennessee Mfg. Co.*, 86 Tenn. 219.

² *Fuller v. Brown*, 11 Met. 440; *Hughes v. Wamsutta Mills*, 11 Allen, 201.

³ *Noon v. Salisbury Mills*, 3 Allen, 340.

⁴ "A man does not quit the service of another when he merely takes a holiday without the other's consent; still less does he quit the service if he only breaks off work for a day because he is sick. . . . A man does not know a fortnight beforehand when he is going to want a day on account of sickness, or even for recreation, and therefore it is not to be supposed that the parties could have had any such transient intermission of service in mind when they stipulated for the fortnight's notice": *Heber v. U. S. Flax Co.*, 13 R. I. 303.

⁵ *Taylor v. Carr*, 30 L. J. M. C. 201.

⁶ *Cranworth*, lord chancellor, in *Morison v. Moat*, 21 L. J., N. S., Ch. 248; *Peabody v. Norfolk*, 98 Mass. 457; 96 Am. Dec. 664.

strained by injunction from making use of knowledge of his master's affairs acquired in his service, to engage in a business enterprise, during the continuance of the contract of service, which may antagonize the interests of the master.¹

§ 264. **Master must Provide Work.**—The master is bound to provide the servant with work during the term, and it is no answer to his claim for wages that he had no work for him to do.²

ILLUSTRATIONS.—The physician of the state penitentiary, which was leased to an individual, was appointed by the inspectors, removable by them only, and his salary was to be paid by the lessee. The lessee refused to permit the physician to enter the penitentiary, and thereupon the latter brought an action against the former for his salary. *Held*, that he was entitled to recover, although he did not perform the duties: *Jones v. Graham*, 21 Ala. 654. The plaintiff agreed to spin at the defendant's factory, at a certain rate per yard, and for a certain time, upon the defendant's furnishing the materials. *Held*, that the defendant must furnish a reasonable supply of work, but that the plaintiff waived his right to terminate the contract if he remained such a length of time in the defendant's service as would lead a jury to infer a waiver, and then left it without stating that he left on account of the want of a supply of work: *Thayer v. Wadsworth*, 19 Pick. 349.

§ 265. **Board of Servant.**—Where by the contract the master is to board the servant, the master cannot charge him for board while he is idle by sickness or without his fault,³ but he cannot charge the master with his board if he boards elsewhere.⁴ In a Georgia case a master undertook to board a servant, and wrongfully dismissed him, and it appeared in a suit by the servant that he was boarded by his new employers. The court held that, as he was re-employed directly after his dismissal, he could

¹ *Gower v. Andrew*, 14 Cent. L. J. 595; *Whittle v. Frankland*, 2 Best & S. 49; 59 Cal. 119; 43 Am. Rep. 242.

² *Bromley v. School District*, 47 Vt. 331; *Cook v. Sherwood*, 11 Week. Rep.

³ *Nichols v. Coolahan*, 10 Met. 450.
⁴ *Griffin v. Tyson*, 17 Vt. 35.

not recover for board, there being no suggestion that the board furnished by his new employer was inferior to that furnished by defendant.¹ A railroad company is liable if it agrees to provide suitable lodging for a laborer, and sends him to a high mountain pass to sleep on frozen ground, with only damp spruce branches for a bed, whereby he becomes sick and paralyzed, and his health is shattered.²

ILLUSTRATIONS. — A and B entered into an agreement by which A was to labor for B, and be boarded by him in a particular way, or at a certain place. *Held*, that A had no right to procure his board in a different way, or at a place not designated between them, and charge B therefor, without showing some failure of performance on the part of B: *Griffin v. Tyson*, 17 Vt. 35. In an action for wages as hotel porter, plaintiff claimed that he was to have twenty-five dollars per month, and that the perquisites of the place were not considered in fixing that price, and that his wife and child were to room and board at the hotel for a sum per month equal to one third of twenty-five dollars. Defendant claimed that the perquisites were considered in fixing the price, and that plaintiff was to pay a reasonable price for the room and board of his wife and child. *Held*, that defendant might show what sums plaintiff received as porter from the guests of the house, as bearing upon the question of whether he was to pay such reasonable price: *Bennett v. Stacy*, 48 Vt. 163.

§ 266. **Compensation of Servant—Measure of.** — Where no agreement is made as to price, the servant is entitled to demand what his services are reasonably worth, judged by the price paid for similar services at the time and place.³ A tradesman removing from one place to another, and there doing work without any agreement about the price, can claim only at the rate of the latter, and not of the former, place.⁴ Where a company contracts to pay an

¹ *Ansley v. Jordan*, 61 Ga. 482.

² *Clifford v. Denver etc. R. R. Co.*, 9 Col. 333.

³ *Jones v. School District*, 8 Kan. 362; *Nauman v. Zoerhlaut*, 21 Wis. 466; *Baum v. Winston*, 3 Met. (Ky.)

127. Where nothing is said of wages, the master is held to contract for the current wages: *Lawson v. Perry*, Wright, 242.

⁴ *Gracy v. Baile*, 16 Serg. & R.

126.

employee "the same wages as shall be paid to other men in the employ of the company filling similar positions," and the laborer sues for compensation, and there is no showing that the company had other employees in similar positions, he is entitled to prove what his services were worth.¹ Where the parties agree as to the compensation, but not as to the term, the servant may recover for the time served at the agreed rate.² Where one performs services to be paid for in a particular way, and they are not so paid for, he may recover their value in money.³ Even where the agreement is that the master is to pay what he thinks the services are worth, he is bound to pay what they are reasonably worth.⁴ The plaintiff may show that the defendant expected to pay very liberally for his services.⁵ Where the contract is that the servant may charge whatever he sees fit, he may nevertheless not recover more than is reasonable.⁶ The measure of compensation for professional services rendered for an infant having property should ordinarily be determined by the same considerations which regulate similar services on behalf of an adult in like circumstances.⁷ There is no rule of law that a person who performs a service with skill is entitled to less compensation than another of more learning and skill who could perform the same services no better.⁸ One who has received the

¹ *Kent Furniture Mfg. Co. v. Ransom*, 46 Mich. 416.

² *Griffin v. Domas*, 22 Ill. App. 203.

³ *Shane v. Smith*, 37 Kan. 55.

⁴ *Millar v. Cuddy*, 43 Mich. 273; 38 Am. Rep. 181; but see, *contra*, *Butler v. Winona Mill Co.*, 28 Minn. 205; 41 Am. Rep. 277.

⁵ *Chiles v. Craig*, 4 Dana, 544.

⁶ *Van Arman v. Bynington*, 38 Ill. 443.

⁷ *Bowling v. Scales*, 1 Tenn. Ch. 618.

⁸ In *Stockbridge v. Crooker*, 34 Me. 349, 56 Am. Dec. 662, a surgeon sued for the value of his services in performing a surgical operation. On appeal the court said: "The jury were

instructed 'that the plaintiff was entitled to recover for the service a sum commensurate with the labor performed, the skill exhibited, and the responsibility incurred by him in the matter.' These were proper subjects for consideration by the jury while they were determining what would be a reasonable compensation for the professional services performed. The law allows a reasonable compensation, and permits the jury to take into consideration all the facts. The same rule of law decides the compensation to be made for services, whether performed by a day-laborer, or by a mechanic, or by a surgeon. It does not enter into

compensation prescribed for his services in a special contract can recover no more, although they were worth more.¹ A person who is employed to do work such as is done by an expert book-keeper may be entitled to an expert book-keeper's salary, though the word "expert" was not used in the contract of hire.² Under a contract by which a salesman is to receive for his services a share of the "net profits" of the business, the interest on capital invested by the principal in the business is not an expense to be deducted in ascertaining the net profits.³ A salesman who is to receive a commission on sales, with the privilege of drawing twenty-five dollars per week, to be deducted from his commissions, is entitled to the weekly payment, though he has not earned commissions to that amount.⁴ It does not preclude a larger recovery that the servant offered to work for others at a lower price;⁵ or that he presented a bill for a less amount.⁶ A present by the master to the servant is not to be deducted from his wages.⁷ Where the contract is to pay in a particular manner, that mode must be pursued, and there is no implied contract to pay in a different manner.⁸

distinctions so nice as to determine, as matter of law, that a mechanic who performs his services faithfully and with competent skill is not entitled to receive as much compensation therefor as another would be who had acquired much greater skill and had performed like services no better. Or that a surgeon who had performed an operation skillfully and faithfully would not be entitled to receive the same compensation as one more learned and skillful who could perform the same operation no better. While the law does not act upon such distinctions, it permits jurors to take into consideration the exhausting studies, the time consumed, and the expenses incurred, to acquire great professional knowledge and distinction, or great mechanical or other skill. If the law made the compensation for services performed commensurate with the skill exhibited and the responsibility incurred, it would be necessary to admit testimony

in such case to prove how much skill had been exhibited, and how great responsibility had been incurred. It would often be difficult if not impossible to receive such testimony in such a manner that a jury could safely act upon it. The rule stated would tend to greatly impair uniformity of compensation for professional and mechanical services of the same description, and to introduce a different rule of compensation for like services when performed by different individuals."

¹ *Bradbury v. Helms*, 92 Ill. 35.

² *Von Kaas v. Hamilton*, 63 Wis. 132.

³ *Paine v. Howells*, 90 N. Y. 660.

⁴ *Weinberg v. Blum*, 13 Daly, 399.

⁵ *Roles v. Mintzer*, 27 Minn. 31.

⁶ *Allis v. Day*, 14 Minn. 516; *Commissioners v. Brewer*, 9 Kan. 308.

⁷ *Neal v. Gilmore*, 79 Pa. St. 421.

⁸ *Smith v. Bowler*, 1 Disn. 520; *Stone v. Stone*, 43 Vt. 130; *Murray v. Baker*, 6 Hun, 264.

A servant entitled to be paid by the month may call for his wages at any time after one month, and his right to monthly payments is not waived by neglecting to demand them monthly.¹ The wages of one employed by the day or month become due at the close of each day or month, there being no contrary understanding.² If the employer has an established place where he pays his servants, the latter are bound to go there for their pay.³ A railroad employee discharged from service is entitled to immediate payment of his wages, and may maintain an action for their recovery, the evidence failing to show a general custom among railroads to defer payment, or notice to the plaintiff of a regulation or usage of his employer to do so.⁴

The master has no right to reduce the wages of a servant during the term for which he has been hired, and the servant waives nothing by remaining in the service after he has been notified that he will not be paid more than a certain sum.⁵ But if the hiring has not been for a fixed term, or if the term has expired, then the servant by continuing in the service after notice that he will be paid less is held to have assented to the change.⁶ It is no defense to an action for day-wages that the work was unskillfully done.⁷ But where one undertakes to do a piece of work in a workmanlike manner, and "as well as any other mechanic could," and the work when completed will not answer the purpose for which it was designed, he cannot recover the price.⁸ Usage may regulate an employee's wages.⁹ Thus the mode of paying the crews of vessels,¹⁰ the proper charges of a veterinary surgeon,¹¹ and the right of a local agent employed to sell glass-ware in a certain territory to claim commissions both upon goods ordered

¹ *White v. Atkins*, 8 Cush. 367.

² *De Lappe v. Sullivan*, 7 Col. 182.

³ *Dockham v. Smith*, 113 Mass. 320; 18 Am. Rep. 495.

⁴ *Thompson v. Minneapolis and St. Louis R'y Co.*, 35 Minn. 428.

⁵ *Hackman v. Flory*, 16 Pa. St. 196.

⁶ *Spier v. Earl*, 41 Mich. 191.

⁷ *Clark v. Fensky*, 3 Kan. 389.

⁸ *Leflore v. Justice*, 1 Smedes & M. 381.

⁹ *Sewell v. Corp.*, 1 Car. & P. 392.

¹⁰ *Eldridge v. Smith*, 13 Allen, 140. But not if unreasonable: *Metcalf v. Weld*, 15 Gray, 210.

¹¹ *Sewell v. Corp.*, *supra*.

directly through him and upon goods ordered by buyers living in the territory of the agent, directly from the manufacturer,¹ have been shown by evidence of custom. So if there be any general custom in a particular business under which payment becomes due weekly, monthly, or otherwise, the parties will be presumed to have contracted with reference thereto, and payment must be made in accordance therewith;² and so on the question of the proper charges of physicians, lawyers, and mechanics, evidence of usage is admissible.³ The proper criterion in the assessment of a *quantum meruit* is the usual and reasonable price which others have received for similar services.⁴ A custom of paying for a whole quarter even when the children are at school only a part of it is valid.⁵ A custom among printers of books that they are not entitled to any thing until the whole work is printed is admissible;⁶ so is a custom that an advertisement given without instructions is kept in a newspaper until ordered to be discontinued.⁷

ILLUSTRATIONS. — An employee of the fire department of the city of New York was appointed to a certain position, to which was attached a certain salary. Subsequently, by an order, he was directed to perform the duties of an inferior position for less pay. *Held*, that by obeying the order and performing the duties of the inferior place for two years, he estopped himself from claiming the pay attached to his original position: *O'Brien v. New York*, 28 Hun, 250; *Monroe v. New York*, 28 Hun, 258. A general actuary of a bank agreed to serve for five years, for "such sums from the net profits of the institution as such profits, after paying all incidental expenses, may warrant, not to exceed one thousand dollars per annum." *Held*, that if no

¹ *Lyon v. George*, 44 Md. 205.

² *Thayer v. Wadsworth*, 19 Pick. 349; *Dodge v. Favor*, 15 Gray, 82. And see *Hunt v. Otis Co.*, 4 Met. 464; *Naylor v. Fall River Iron Works*, 118 Mass. 317; *Baxter v. Nurse*, 6 Man. & G. 935; 1 Car. & K. 10; *Fairman v. Oakford*, 5 Hurl. & N. 635; *Cutter v. Powell*, 2 Smith's Lead. Cas. 21; *Gray v. Murray*, 3 Johns. Ch. 167.

³ *Pursell v. McQueen*, 9 Ala. 380; *Hayes v. Moynihan*, 60 Ill. 409; *Ewing v. Beauchamp*, 4 Bibb, 496; *Johnson v. De Peyster*, 50 N. Y. 466.

⁴ *Murray v. Ware*, 1 Bibb, 325; 4 Am. Dec. 637. But see *Sennett v. Pierce*, 1 Mart., N. S., 192.

⁵ *Keckeley v. Cummins*, Harp. 268.

⁶ *Gillett v. Mawman*, 1 Taunt. 138.

⁷ *Thomas v. O'Hara*, 1 Mill Const. 303.

profits were made in one year, defendant could not claim compensation for the services of that from the profits of a subsequent year: *Jennery v. Olmstead*, 90 N. Y. 363.

§ 267. **Master may Recoup Damages.**—In an action for wages, the master may recoup damages which he has suffered through the servant's neglect or failure to work as agreed.¹ Thus where the plaintiff sues for labor on a building contract, the defendant may recoup damages for the work not being according to contract,² or not done within the time specified in the contract.³ In an action for wages for service in a family, the employer may recoup damages for the seduction of his daughter by the servant.⁴ If the servant spoil material used by him, he is not liable for its first value, but only its depreciated value.⁵ One who employs an unskillful artisan or tyro, knowing his deficiencies, is liable to him for his usual prices, however inferior the performance may be, especially when the work has been received.⁶ And it is no defense to an action for wages that the employee had, by negligently injuring a third person, exposed the employer to liability for damages, unless the employer has actually paid, or has been adjudged liable to pay, damages.⁷ A contract allowing stipulated damages for the breach of a mechanic's contract of service, to be valid, must provide for some fixed and reasonable sum of forfeiture, which is not

¹ *Stoddard v. Treadwell*, 26 Cal. 294; *Pixler v. Nichols*, 8 Iowa, 106; *Still v. Hall*, 20 Wend. 51; *Blodgett v. Berlin Mills Co.*, 52 N. H. 215; *Field v. Ringo*, 7 Ark. 435; *Brunson v. Martin*, 17 Ark. 270; *Lee v. Clements*, 48 Ga. 128; *Phelps v. Paris*, 39 Vt. 511; *De Witt v. Cullings*, 32 Wis. 298; *Campbell v. Somerville*, 114 Mass. 334; *Allaire Works v. Guion*, 10 Barb. 55; *Newman v. Reagan*, 63 Ga. 755.

² *Adlard v. Muldoon*, 45 Ill. 193; *Queen v. Doolan*, 55 Ill. 526; *Estep v. Fenton*, 66 Ill. 467; *Cooke v. Preble*, 80 Ill. 381; *Haysler v. Owen*, 61 Mo.

270; *Elliot v. Heath*, 14 N. H. 131.

³ *Cooke v. Preble*, 80 Ill. 381; *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Wagner v. Corkhill*, 40 Barb. 175; *Duckworth v. Allison*, 1 Mees. & W. 412; *Barber v. Rose*, 5 Hill, 76; *Front etc. R. R. Co. v. Butler*, 50 Cal. 574.

⁴ *Bixby v. Parsons*, 49 Conn. 483; 44 Am. Rep. 246.

⁵ *Hillyard v. Crabtree*, 11 Tex. 264; 62 Am. Dec. 475.

⁶ *Peters v. Craig*, 6 Dana, 307.

⁷ *Merlette v. North and East River Steamboat Co.*, 13 Daly, 114.

oppressive or unequal in its effect on the parties. One simply forfeiting all wages due at the time of leaving will not be enforced. A forfeiture of thirty days' wages by the employer, for his default, is too vague and indeterminate as a consideration to sustain a forfeiture of wages against a workman engaged in piece-work, and is void for want of mutuality.¹

ILLUSTRATIONS.—Goods intrusted to a common carrier were injured by the negligence of the carrier's servant. The carrier paid the damages to the owner. *Held*, that he could recover the amount from his servant: *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647. A railroad conductor sues the company for wages. The latter may set off and recover damages which it has sustained by the conductor's negligence in performing his duties: *Mobile R. R. Co. v. Clanton*, 59 Ala. 392; 31 Am. Rep. 15. An employee might have finished work for his employer at a certain time, but failing to do so, it was yet accepted by the employer when afterward finished. *Held*, that the employer could not afterward avoid liability on the ground of its not being finished in time, but that he had a counterclaim or recoupment to the extent of his loss by such delay: *Rogers v. Beard*, 36 Barb. 31.

§ 268. **Right of Master to Servant's Earnings.**—If a servant, other than an apprentice, engages in other employment which does not infringe on the time to which the master is entitled, the latter has no claim to his earnings; but if he takes other employment during the time that the master is entitled to his services, the master is entitled to his earnings as against the servant, but not against the person employing him, unless the latter knew when he so employed him that the master was entitled to his time, and was paying him therefor.² On a contract for services for a fixed compensation as agent in settling claims, the master is *prima facie* entitled to notary's fees earned by the servant in the employment.³

¹ *Richardson v. Woehler*, 26 Mich. 90.

² *Wood on Master and Servant*, sec. 101. The master is not liable for the expenses of the servant's sickness con-

tracted in his service: *Wennall v. Adney*, 3 Bos. & P. 247.

³ *Leach v. R. R. Co.*, 86 Mo. 27; 56 Am. Rep. 408.

That an employee, after his discharge, has engaged in business for himself in competition with his late employer, is no defense to the former's action for a breach of hiring.¹ A mechanic hired for the purpose of perfecting certain machinery, and bound to devote his skill and labor to the interest of those for whom the machinery is being worked, is not, by that fact, under any obligation to abstain from applying for a patent in his own name for such machinery, if otherwise entitled thereto.²

ILLUSTRATIONS.—The defendant was in the employ of the plaintiff under a written agreement to work for the interest of plaintiff in the manufacture of shellers and powers, and to give the latter any improvements he might make. *Held*, that he was not bound to assign to plaintiff his interest in an invention in check-rowers, although the plaintiff had added the manufacture of check-rowers to its other business, and defendant employed his time in perfecting his invention by the consent of the plaintiff, and with the assistance of its agents and employees: *Joliet Mfg. Co. v. Dice*, 105 Ill. 649; *Dice v. Joliet Mfg. Co.*, 11 Ill. App. 109.

§ 269. Right to Discharge Servant—By Contract.—

The contract may give the master a right to discharge the servant without his assigning any reason, or it may give him a right to do so for certain specified reasons, in which case, to justify a discharge, those reasons must be shown to exist. Where the contract under which a ball-player is employed provides that the club is to be the sole judge of the sufficiency of the reasons for discharging him, he may not be discharged without a reason or the allegation of a reason.³ A corporation cannot discharge a servant at any time without sufficient cause, by virtue of a general power of removal of employees, contained in its charter, if it makes a specific contract with him for a fixed time.⁴ Under an agreement for the employment of

¹ *Stone v. Vimont*, 7 Mo. App. 277.

² *Green v. Willard Barrel Co.*, 1 Mo. App. 202.

³ *Winship v. Portland League Base Ball etc. Assoc.*, 78 Me. 571.

⁴ *Soldiers' Orphans' Home v. Shaffer*, 63 Ill. 243.

a clerk at a commission on all business done by him, a monthly allowance to be paid to him on account of it, and the balance not to be paid until the end of the year, he agreeing to forfeit such balance if he should not remain till then, the employer has a right to discontinue his services during the year, and thus prevent him from being entitled to the balance of commissions, provided a sufficient cause therefor arises, such as his intoxication, unfitting him for his duties.¹ Where a person who contracts to render certain personal services in consideration of a share in the profits of the business in which he is to engage, and who agrees to abstain from the use of intoxicating drinks while engaged in the business of his employment, subsequently unfits himself for the proper transaction of such business by habits of intemperance, he cannot in equity recover the specified share of the profits for the time he kept his contract, but will be allowed a reasonable compensation for his services during that period.² Where there is a provision in a contract for personal services that the employee may leave in case of a disagreement, the fact of a *bona fide* disagreement is all that is necessary to entitle either party to put an end to the contract.³

ILLUSTRATIONS.—A was to labor for B for a specified time, and at stipulated wages, "if they could agree." *Held*, that either party might terminate the contract at pleasure, and without showing any reasonable cause of disagreement: *Durgin v. Raker*, 32 Me. 273. D. was employed by S. for a week, and if she suited to continue during the summer months. Before the end of the week, S. declared that D. suited, and D. said: "Then as long as I suit you, there is no fear for the summer months"; to which S. replied affirmatively. *Held*, that the employment remained conditional on D.'s continuing to suit S.: *Daveny v. Shattuck*, 9 Daly, 66. One agrees to work for a year for a stipulated sum, payable weekly, provided his services are satisfactory to his employers, in case of disagreement, installments to be paid to the time of disagreement, unless an amicable settlement can

¹ *Huntington v. Clafin*, 10 Bosw. 262.

² *Foster v. Watson*, 16 B. Mon. 377.

³ *Gates v. Davenport*, 29 Barb. 160.

be arranged. *Held*, that the employer may discharge at any time without assigning a reason: *Spring v. Ansonia Clock Co.*, 24 Hun, 175.

§ 270. **Right to Discharge Servant—By Law in Absence of Special Contract.**—But in the absence of a contract, there are many things which may furnish the master with a legal right to discharge the servant,—the doing or leaving undone certain things being considered by the law as breaches of the implied contract of the servant to serve the master faithfully. If a good ground exists at the time of the discharge, it is not necessary that the master should have known it at that time,¹ or that at the time he gave another and different reason.² The misconduct, to justify a discharge, must be misconduct *while in the service*, unless it is of such a character, that its existence does an actual injury to the master's business, or is in the nature of a continuing misconduct.³ An employer is the sole judge of the competency of those whom he chooses to employ; and so long as the employee is on trial, the employer has the right to determine for himself whether he possesses the proper qualifications and habits for his business.⁴

ILLUSTRATIONS. — The master discovers that the servant, previous to his hiring him, has been convicted of a crime. *Held*, not *per se* a good ground for discharge: Wood on Master and Servant, sec. 110. A master discharged a governess on discovering that she had previously been delivered of a bastard child. *Held*, not a good ground: *Degroesberg's Case*, cited in Wood on Master and Servant, sec. 110. A master discharged a governess on learning that she had concealed the fact that she had been divorced. *Held*, not a good ground: *Fletcher v. Knell*, 42 L. J. Q. B. 58. A employed B for one year as overseer at a fixed salary. B went to A drunk, and A refused to receive him. *Held*, that A was justified, although B was not in the habit of getting drunk: *Johnson v. Gorman*, 30 Ga. 612.

¹ *Harrington v. Bank*, 1 Thomp. & C. 361; *Ridgway v. Market Co.*, 3 Ad. & E. 171; *Mercer v. Whall*, 5 Q. B. 447.

² *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8.

³ Illustrations *post*.

⁴ *Quirk v. Haskins*, 15 La. Ann. 656.

§ 271. **Valid Grounds for Dismissal.**—The following have been held good causes, viz.: Absenting himself without leave;¹ conduct prejudicial to the master's interests generally;² creating dissatisfaction among his fellow-servants;³ defrauding or attempting to defraud the master;⁴ engaging in business for himself or another;⁵ false representations as to his capacity;⁶ immoral conduct;⁷ insolence to the master,⁸ for there is an obligation implied on the part of the servant to treat him respectfully;⁹ intoxication, where it is habitual and it interferes with the discharge of the servant's duties,¹⁰ but not an occasional over-indulgence in liquor;¹¹ unfitness to perform his duty by reason of the use of opiates, and by reason of unsound mental condition;¹² making false representations to his

¹ Ford v. Danks, 16 La. Ann. 119. But a short absence which does not injuriously affect the interests of the master has been held not sufficient to justify a discharge: *Fillieul v. Armstrong*, 7 Ad. & E. 557. An employer may not discharge an employee from his factory for a single act of disobedience, in absenting himself for a day, not involving any serious consequences, and not unreasonable in itself: *Shaver v. Ingham*, 58 Mich. 649; 55 Am. Rep. 712.

² *Singer v. McCormick*, 4 Watts & S. 266; *Newman v. Reagan*, 65 Ga. 512; *Brink v. Fay*, 7 Daly, 562; *Jones v. Trinity Parish Vestry*, 19 Fed. Rep. 59; *Read v. Dunsmore*, 9 Car. & P. 588; *Dieringer v. Meyer*, 42 Wis. 311; 24 Am. Rep. 415.

³ *Lacy v. Osbaldiston*, 8 Car. & P. 80; *Weaver v. Halsey*, 1 Ill. App. 558.

⁴ *Wood on Master and Servant*, sec. 115.

⁵ *Stoney v. Trans. Co.*, 17 Hun, 579; *Adams Exp. Co. v. Trego*, 35 Md. 47; *Dieringer v. Meyer*, 5 Cent. L. J. 291; 42 Wis. 311; 24 Am. Rep. 415. It is no defense to a suit for wages that the services were rendered while the plaintiff was an employee of a third person in another line of business, and both during and outside the business hours of such third person: *Wallace v. De Young*, 98 Ill. 638; 38 Am. Rep. 108.

A traveling commercial agent commits no violation of duty by taking, gratuitously, orders for goods upon a house in whose service he has formerly been employed, if without prejudice to the interests of his employers: *Geiger v. Harris*, 19 Mich. 209.

⁶ *Anstee v. Ober*, 26 Mo. App. 665.

⁷ *Atkin v. Acton*, 4 Car. & P. 208; *Weaver v. Halsey*, 1 Ill. App. 558.

⁸ *Beach v. Mullin*, 34 N. J. L. 243.

⁹ *Baillie v. Kell*, 4 Bing. N. C. 638.

¹⁰ *Huntington v. Claffin*, 10 Bosw.

262; *McCormick v. Demary*, 10 Neb. 515; *Gonsolis v. Gearheart*, 31 Mo. 585. A foreman of a tailor's shop who goes on a spree has no cause of action for future wages if he is discharged or reprimanded so that he leaves: *Physioc v. Shea*, 75 Ga. 466. If one who has hired a servant ascertains that he is a drunkard before the term of service begins, the contract may be repudiated: *Nolan v. Thompson*, 11 Daly, 314.

¹¹ *Id.*; *Wood on Master and Servant*, sec. 113. A master may discharge his servant for public drunkenness and disorderly conduct, although it was only on one occasion, and did not incapacitate the servant, or cause him to fail in the performance of his work: *Bass Furnace Co. v. Glasscock*, 82 Ala. 452; 60 Am. Rep. 748.

¹² *Lyon v. Pollard*, 20 Wall. 403.

employer;¹ negligence or unskillfulness in the discharge of his duties,² whether arising from lack of skill, without his fault, or willful carelessness or neglect,³ for there is an implied obligation on the part of the servant to serve the master diligently and faithfully,⁴ and that he is possessed of the requisite skill in the business in which he is engaged to do so,⁵ but the master will be estopped where he knew the qualifications and habits of the servant when

¹ *Horton v. McMartry*, 5 Hurl. & N. 674; *Jones v. Trinity Parish Vestry*, 19 Fed. Rep. 59. In an action to recover damages for a wrongful discharge from service, under a contract providing for a certain salary in consideration of plaintiff's exclusive time and services, the defendant may show, on cross-examination of plaintiff, that when plaintiff was employed he made false representations to defendant; that he afterwards refused to obey instructions; that he did not do work enough to earn his salary; that he received pay from other parties during the term of the contract; and also by direct evidence the amount of goods sold by plaintiff, and that they were sold contrary to instructions; that he sold scarcely any goods, when he might have sold large quantities; and that his work was not done according to contract, and on that account was worthless; *Child v. Detroit Mfg. Co.*, Mich., 1888.

² *Wood on Master and Servant*, sec. 120; *Stanton v. Bell*, 2 Hawks, 145; 11 Am. Dec. 744; *Eaton v. Woolly*, 28 Wis. 628; *Morris v. Rodfield*, 23 Vt. 295. Inaccuracies and discrepancies in the books of a merchant are sufficient cause for the discharge of a book-keeper by his employer; *Griffin v. Haynes*, 24 La. Ann. 480.

³ *Griffin v. Haynes*, 24 La. Ann. 480. In *Lyon v. Pollard*, 20 Wall. 403, Mr. Justice Miller said: "We do not agree with counsel that for the insanity of plaintiff, or her mental incapacity to perform her part of the contract, whether from natural infirmities or from the use of opium, the only remedy of the defendant is an action against her on the contract. The plaintiff was employed to perform important and specific duties. Her compensation for

this was to be one fifth of the net proceeds of the business which she had agreed to superintend. If she rendered herself, or otherwise became, incapable of performing these duties, that of itself authorized defendant to rescind or terminate the contract. He was not bound to continue as the superintendent of a large hotel a person who was a lunatic, or who was so stupid under the influence of narcotics that her presence was a danger and an injury, and who could render no reasonable service. The contract on her part required some capability of performing the duties she had assumed, of rendering some service. If she could render none, defendant was not bound to continue it even for the thirty days which the termination of it by notice required."

⁴ *McCracken v. Hair*, 2 Spear, 256; *Mercer v. Whall*, 5 Q. B. 447; *Waugh v. Shunk*, 20 Pa. St. 130. That the fact that his efforts to make sales did not prove more successful, and that another person who was afterwards employed in the same capacity had succeeded in making larger sales, was no evidence that he did not serve the firm faithfully and to the best of his ability; *Hamill v. Foote*, 51 Md. 419.

⁵ *Harmer v. Cornelius*, 5 Com. B., N. S., 236; *Goslin v. Hodson*, 24 Vt. 140; *McDonald v. Simpson*, 4 A. 523; 38 Am. Dec. 45. Where a salesman sues to recover a salary dependent on the amount of his sales, his lack of diligence may be shown by his employer; and the employer's expressions of confidence, based upon the salesman's reports, while admissible in evidence, do not preclude the employer from showing a lack of diligence; *Alberts v. Stearns*, 50 Mich. 349.

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he hired him;¹ not accounting for goods received or money collected;² obscene language used by the servant;³ refusing to obey the master's orders, provided they are reasonable;⁴ for the servant is not bound to obey an unlawful command, as to do a fraudulent, immoral, or criminal act;⁵ but there is an implied obligation on the part of the servant to obey his reasonable orders and commands;⁶ slandering his employer;⁷ stealing from the master or embezzling his money;⁸ substituting another in his place or stead;⁹ suing the master repeatedly for wages not due;¹⁰ taking bribes from workmen to favor them.¹¹

ILLUSTRATIONS.—A servant aided a fellow-servant in leaving, and told him to take his wages from the till. *Held*, a good ground: *Turner v. Robinson*, 6 Car. & P. 16. A clerk of a railroad company was discharged for disclosing to a person connected with another company the accounts of the company. *Held*, proper: *Railroad Co. v. Lythgoe*, 2 Lown. M. & P. 221. A clerk quarreled with another clerk in the store, and drew a revolver in the presence of customers. *Held*, to justify his discharge: *Kearney v. Holmes*, 6 La. Ann. 373. The plaintiff was

¹ *Felt v. School District*, 24 Vt. 297; *Peters v. Craig*, 6 Dana, 307.

² *Blenkam v. Hodge*, 16 L. T., N. S., 608.

³ *Wood on Master and Servant*, sec. 112. In *Hamblin v. Race*, 78 Ill. 422, the court said: "It was contended that the appellee was insolent to his employers, and coarse and vulgar in his conduct, to such an extent as fully justified appellants in discharging him. This was a question of fact for the determination of the jury. All will at once concede that an employee must be respectful and obedient to all reasonable commands of his employers and those having control of the business in which he is employed, and no one will dispute that a person so employed, when engaged in the discharge of his business, and in his intercourse with customers and persons transacting business with the house and with his employers and those having charge of the business, must be respectful, and must abstain from all vulgarity

and obscenity of language and conduct. If wanting in any of these requirements, it would be grounds for discharging a salesman in a store from his employment."

⁴ *Wood on Master and Servant*, sec. 119; *Jacquot v. Bourra*, 7 Dowl. Pr. 348; *Spain v. Arnott*, 2 Stark. 256; *Turner v. Mason*, 14 Mees. & W. 112; *Callo v. Brouncker*, 4 Car. & P. 518; *Still v. Hall*, 20 Wend. 51; *Mitchell v. Toale*, 25 S. C. 238; 60 Am. Rep. 502.

⁵ *Cullen v. Thomson*, 4 Macq. 424; *R. v. Muttons*, 34 L. J. 54.

⁶ *Harrington v. Bank*, 1 Thomp. & C. 361; *Lawrence v. Gullifer*, 38 Me. 532.

⁷ *Brink v. Fay*, 7 Daly, 562.

⁸ *Trotman v. Dunn*, 4 Camp. 211; *Libhart v. Wood*, 1 Watts & S. 265; 37 Am. Dec. 461.

⁹ *Stanton v. Bell*, 2 Hawks, 145; 11 Am. Dec. 744.

¹⁰ *Brink v. Fay*, 7 Daly, 562.

¹¹ *Engel v. Schoolherr*, 12 Daly, 417.

a salesman in defendant's store. Without the latter's knowledge he sold goods to a firm in which he was a partner. *Held*, a good cause for his discharge: *McDonald v. Lord*, 26 How. Pr. 404. A female servant during her term of service becomes *enceinte*. *Held*, a good ground for discharge: *Rex v. Brampton*, Cald. 11. A servant attempted to ravish a female fellow-servant. *Held*, a good ground for discharge: *Atkin v. Acton*, 4 Car. & P. 208. Bladders were bought from one person, and the servant represented to the master that another person was the seller. *Held*, a good ground for discharge: *Horton v. McMurty*, 5 Hurl. & N. 667. A servant appropriated in payment of his salary \$150 sent to him by his master for business purposes. *Held*, a valid ground for discharge: *Smith v. Thompson*, 8 Com. B. 44. A book-keeper made errors in his master's books. *Held*, a valid ground for his discharge: *Griffin v. Haynes*, 24 La. Ann. 480. A traveling salesman was instructed by his employers to remit at once. He sold wine to a brothel-keeper, and did not remit. *Held*, a good ground: *Blenkern v. Hodge*, 16 L. T., N. S., 608. A bank teller who often remained at work after hours left the iron shutters of the windows open, and was remonstrated with by the cashier, but replied that he would do as he pleased. On another occasion this was repeated. *Held*, to justify his discharge: *Harrington v. Bank*, 1 Thomp. & C. 361. A domestic servant being ill, her master gave her some medicine, and directed her not to go to church. She disobeyed and went to church. *Held*, a good ground for discharge: *Hamilton v. McLean*, 3 Shaw & D. 379. A servant refused to go to bed when so commanded by the master. *Held*, a good ground for discharge: *Wheatly v. White*, 12 Sol. Jour. 812. A nurse-girl who had been ordered not to take the master's child into the house of a stranger did so. *Held*, a good ground: *Gibson v. Pentland*, cited in Wood on Master and Servant, sec. 119. An express company employed as messenger a conductor on a railroad. *Held*, that they must have contracted with him with reference to his prior obligations to the railroad company, and that he was not liable to them for a neglect caused by his attending to his duties as conductor: *Southern Express Co. v. Frink*, 67 Ga. 201. In an action upon a contract to employ the plaintiff as overseer of a plantation at a certain salary, it appeared that the defendant had refused to receive the plaintiff into his service because he came to him drunk. *Held*, that the refusal was justifiable, although it was proved that the overseer was not a common drunkard: *Johnson v. Gorman*, 30 Ga. 612. A clerk of a partnership, under a contract for a fixed salary the first year, and an increase of salary afterwards, secretly over-drew, on the faith of such increase, but on being applied to by

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one of the partners, disclosed the facts. *Held*, that he had not thereby forfeited his right to an increase of salary, a majority of the partners having continued him in the service of the firm, under the conviction that no fraud was intended: *Kirk v. Hodgson*, 3 Johns. Ch. 400.

§ 272. **Involuntary Breaches by Servant.**—Where the breach of the contract or regulations of the master is involuntary on the part of the servant, he will not suffer;¹ as, where the cause is the act of God,² or of the law,³ or something beyond his control.⁴

¹ He may recover his wages for the time he has served: *Vide* cases in next note. M. was employed to serve T. as a clerk in his store for the term of one year, at forty dollars per month. During the term, M. was discharged for embezzlement, indicted for the crime, and acquitted. It was held that M. might maintain an action against T. to recover what his services were reasonably worth during the time of his employment, not exceeding the rate of compensation stipulated: *Massey v. Taylor*, 5 Cold. 447; 98 Am. Dec. 429. But he cannot recover damages for the refusal of the master to take him back. Thus in *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93, A, a salesman, contracted with B, a clothing manufacturer, to work for him for a term of three years, at a stated salary. Shortly after A entered upon his work, he was arrested and put in jail for two weeks during the busiest season of B. It was held that the arrest of A, though without his fault, and his failure to work, necessitating the employment of another in his place, was an abandonment of the contract, and precluded him from recovering damages for B's refusal to take him back. And if his sickness put the master to greater expense than what is due him, in obtaining another to take his place, he can recover nothing: *Patrick v. Putnam*, 27 Vt. 759; and see *Clark v. Gilbert*, 26 N. Y. 279; 84 Am. Dec. 189.

² *Clark v. Gilbert*, 26 N. Y. 279; 84

⁴ As in *Millot v. Lovett*, 2 Dane Abr. 461, where a seaman, before completing a voyage for which he was

Am. Dec. 189; *Fuller v. Brown*, 11 Met. 440; *K. v. Raschen*, 38 L. T., N. S., 38. Although a sickness incapacitating an overseer from work for half a month is not alone sufficient cause for discharging him, this, combined with such repeated failures correctly to keep the time of the plantation hands as causes discontent endangering their continuance at work, may constitute such cause: *Miller v. Gidiere*, 36 La. Ann. 201.

³ In *Hughes v. Wamsutta Mills*, 11 Allen, 201, the master in an action for wages set up that by a regulation known to the servant, two weeks' notice of leaving the service was required, which the plaintiff before leaving had not given. It appeared that the servant had been arrested on a charge of adultery, and was in jail. The plaintiff had judgment, *Bigelow, C. J.*, saying: "The stipulation clearly had reference only to a voluntary abandonment of the defendant's employment, and not one caused *vi majeure*, whether by the visitation of God or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it; he could give notice only of such departure as he could anticipate, and the stipulation that he was to have the privilege of leaving, after giving two weeks' notice, without forfeiting his wages, implied that the forfeiture was to take place only when it would be within his power to give the requisite notice. It certainly can-

signed, was captured by the enemy, it was held that he could recover his wages.

§ 273. **Discharged Servant must Leave Peaceably—Ejection.**—When a servant is discharged he must leave peaceably. The master may order him out of the house and from the premises, and if he refuses to go, may use force.¹

§ 274. **Servant may Recover Wages to Time of Dismissal.**—Where a servant is dismissed for a legal cause, he may nevertheless recover the agreed wages up to the time of the dismissal, subject to any legal set-off by the master.² But it has been held that where there is an en-

not be contended that the stipulation was absolute; that he was to receive no wages in case of leaving without notice, whatever may have been the cause of his abandonment of the service. It is settled that absence from sickness, or other visitation of God, would not work a forfeiture of wages under such a contract: *Fuller v. Brown*, 11 Met. 440. *Pari ratione*, any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to cause a forfeiture of wages. It may be said that in the case at bar the omission of the offense for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it, and led to his compulsory departure from the defendant's service, are therefore to be regarded as bringing the case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is, that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service, occasioned by sickness or severe bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his service under a contract. The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of wages, the

abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act, of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts of occurrences not foreseen or anticipated, over which the person employed had no control; and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor."

¹ *De Briar v. Minturn*, 1 Cal. 450; *Haywood v. Miller*, 3 Hill, 90.

² *Murdock v. Phillips Academy*, 12 Pick. 244; *Du Quoin Co. v. Thorwell*, 3 Ill. App. 394; *Jenkins v. Long*, 8 Md. 132; *Byrd v. Boyd*, 4 McCord, 246; 17 Am. Dec. 740; *Newman v. Reagan*, 63 Ga. 755; *Foster v. Watson*, 16 B. Mon. 377; *Lawrence v. Gullifer*, 38 Me. 532; *Sugg v. Blow*, 17 Mo. 359; *Jones v. Jones*, 2 Swan, 605; *Massey v. Taylor*, 5 Cold. 447; 98 Am. Dec. 429. In *Taylor v. Paterson*, 9 La. Ar. 251, it was held that a servant rightfully discharged before the end of a term may recover the wages actually earned, subject to deductions for his torts, and for the inconvenience the master is put to through being compelled to hire another in his place, *Contra*, and that the servant cannot recover his wages: *Libhart v. Wood*, 1 Watts & S. 235; 37 Am. Dec. 463;

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ILLUSTRATIONS.—A sued B to recover money due under a contract of service as a farm laborer, the contract also imposing upon A the duty of selling the farm produce for B. Acts of dishonesty and speculation on A's part were proved, and B therefore claimed that A was entitled to nothing. *Held*, that B's position was untenable, but that B might set off against A's claim all amounts that he could show that A had improperly retained: *Turner v. Kouwenhoven*, 29 Hun, 232.

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§ 275. **Servant Occupying Master's House—When and when not Tenant.**—A servant occupying a dwelling-house or premises belonging to the master, and as accessory to his employment, does not become a tenant of the master.² Therefore the master is not a trespasser if he ejects the tenant after dismissing him, even if he has been dismissed illegally and without cause.³ After the service is at an end, however, the master must resume control of

Singer v. McCormick, 4 Watts & S. 267; *Beach v. Mullin*, 34 N. J. L. 343. In *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183, it is said: "If a person retain a servant for a year at wages, the performance of the service is a condition precedent to the payment of wages, and the servant cannot recover them before he has performed the year's service. If he is prevented by his employer from fulfilling his contract, and is wantonly and without sufficient cause discharged before the expiration of the period for which he was hired, he is entitled to the wages for the whole period he was to serve; but if there is any fault or misconduct in him towards his employer sufficient to warrant his discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages. Reciprocal justice requires that such should be the law of contracts of this character; if it were otherwise, then

while the employer is bound by his contract to retain the servant, although it may be against his inclination, for the whole period of his service, or pay him the whole wages, the servant, by his misconduct, may compel his employer, for his own security, to discharge him, and then recover wages for the term he has served. So while the contract is binding on the employer, the servant is bound or not, at his option. Such a construction of the contract would encourage fraud and wickedness in servants, and induce them, whenever their inclination prompts, to be guilty of such enormities as will compel their discharge."

¹ *Libhart v. Wood*, 1 Watts & S. 265; 37 Am. Dec. 453.

² *Haywood v. Miller*, 3 Hill, 90; *Hughes v. Chatham*, 5 Man. & G. 54; *People v. Annis*, 45 Barb. 304.

³ *Haywood v. Miller*, 3 Hill, 90; *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158.

the premises within a reasonable time; otherwise the servant will become a tenant at will.¹

§ 276. Wrongful Discharge of Servant—Remedies.—

A servant wrongfully discharged has two remedies, either of which he may pursue at his election, viz.: 1. He may treat the contract as rescinded, and sue the master on a *quantum meruit* for the services rendered; 2. He may treat the contract as continuing, and sue the master for damages for the breach.² The remedies are the same where the master has contracted to employ the servant for a term, but refuses to receive or employ him.³ Formerly it was held that the servant could recover the entire wages for the whole term on simply showing that he was ready at all times to perform his contract, a doctrine of "constructive service" being invoked in the servant's behalf.⁴ But in later times this doctrine is criticised as unwise and unfair, and as encouraging idleness by permitting the servant to sit down with his arms folded and receive the wages of a worker;⁵ and it is now universally

¹ *Kerrains v. People*, 60 N. Y. 225; 19 Am. Rep. 158; *Doyle v. Gibbs*, 6 Lans. 180.

² "These remedies are independent of and additional to his right to sue for wages for sums actually earned and due by the terms of the contract. This last amount he recovers because he has completed either in full or in a specified part the stipulations between the parties. The first two remedies pointed out are appropriate to a wrongful discharge": *Howard v. Daly*, 61 N. Y. 370; 19 Am. Rep. 285; *Smith on Master and Servant*, p. 96; *Richardson v. Eagle Machine Works*, 78 Ind. 422; 41 Am. Rep. 584; *Powers v. Wilson*, 47 Iowa, 666; *Bradshaw v. Branan*, 5 Rich. 465; *McDaniel v. Parks*, 19 Ark. 671; *Gardenhire v. Smith*, 39 Ark. 280; *Cox v. Adams*, 1 Nott & McC. 284; *Walworth v. Pool*, 9 Ark. 394; *Rogers v. Parham*, 8 Ga. 190; *Britt v. Hays*, 21 Ga. 157; *Fowler v. Armour*, 24 Ala. 194; *Miller v. Goddard*, 34 Mo. 102; 56 Am. Dec.

638; *Jones v. Jones*, 2 Swan, 605; *Colburn v. Woodworth*, 31 Barb. 381; *Heim v. Wolf*, 1 E. D. Smith, 70; *Webster v. Wade*, 19 Cal. 291; 79 Am. Dec. 218.

³ *Davis v. Ayres*, 9 Ala. 292; *Hochster v. De la Tour*, 2 El. & B. 678; *Crist v. Armour*, 34 Barb. 378; *Utter v. Chapman*, 38 Cal. 659; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Petitt v. Turner*, 2 Thomp. & C. 608.

⁴ *Candell v. Pontiguy*, 4 Camp. 375; *Aspdin v. Austin*, 5 Q. B. 671; *Decamp v. Hewitt*, 11 Rob. (La.) 290; 43 Am. Dec. 204.

⁵ Thus in *Howard v. Daly*, 61 N. Y. 363, 19 Am. Rep. 285, the court say: "This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person dis-

held that the measure of the servant's recovery is the sum he was to receive during the term, less such sums as he may have earned or could have earned by reasonable diligence in obtaining other employment.¹ Where the

charged from service may recover wages or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages! The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor, and no rule can be sound which gives him full wages while living in voluntary idleness."

¹ Wolf v. Studobaker, 65 Pa. St. 459; Spencer v. Halstead, 1 Denio, 606; Heckscher v. McCrea, 24 Wend. 309; Wilson v. Martin, 1 Denio, 602; Hood v. Raines, 19 Tex. 400; Lindley v. Dempsey, 45 Ind. 246; Miller v. Mariners' Church, 7 Me. 51; 20 Am. Dec. 341; Walworth v. Pool, 9 Ark. 394; Chamberlin v. McCalister, 6 Dana, 352; Shannon v. Comstock, 21 Wend. 457; 34 Am. Dec. 262; Ream v. Watkins, 27 Mo. 516; 72 Am. Dec. 283. In Byrd v. Boyd, 4 McCord, 246, 17 Am. Dec. 740, it is said: "The English cases go very far in establishing that contracts, particularly with servants and seamen, cannot be apportioned, and that the performance of the service is a condition precedent to the payment of wages, and they result in the rule that when they are prevented from performing it by the misconduct of the master, they are entitled to the stipulated wages for the whole time, and *e converso*, they are entitled to nothing if they abandon service voluntarily. And yet the rule has been so far relaxed as to entitle the master to a deduction of any sum which a seaman may have earned in another

vessel in the mean time: Abbot, 392; 1 Comyn on Contracts, 362. This rule is evidently the result of expediency, especially as applied to seamen; and it becomes a question of some importance how far it is applicable to the subject under consideration. The relation of employer and overseer is one which the state of the country renders almost indispensably necessary to every planter; and collisions do and must necessarily arise, and it is fit that there should be some settled rule on the subject. Where the employer wantonly and without cause turns off his overseer at a season of the year when it would be impracticable to get employment elsewhere, and his time is wholly lost, I should feel no hesitation in enforcing the rule rigidly, not only as a punishment, but as a just remuneration to the overseer; and so when the overseer abandons the employer without cause, or by his neglect inflicts a loss on him commensurate with the services which he has performed, he clearly deserves no compensation. There is, however, a third class of cases for which it is necessary to provide, and which are perhaps of the most common occurrence. They are those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable, and that perhaps not immediately connected with the contract, as in the present case. It happens frequently, too, that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I cannot reconcile it to my notions of natural justice that the overseer should not recover a compensation for the services, so far as they were directed and which have been beneficial to the employer, and I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country, and as a matter of expediency I should be disposed to establish it as a rule."

servant is employed for a term and wrongfully discharged before the end of it, the presumption is, that he is entitled to recover for the whole term, and the burden is on the defendant to show a legal excuse for not paying him the full amount for the whole term.¹ The defendant must prove "either that the plaintiff was actually engaged in other profitable service during the term, or that employment was offered him and he rejected it."² If the servant finds employment at the same or higher wages, he is entitled to recover for the time actually lost; and if he finds employment at lower wages, he is entitled to recover the difference between the amount earned and what his master had agreed to pay him.³ The servant may recover wages during the time he is idle, even though in his second employment he gets higher wages than under his first contract, and therefore in all he is better off than though he had not been discharged.⁴ If the servant sue for the breach before the term expires, he can only recover damages up to the time when he sues; but if he waits until the end of the term, he can recover full damages for the whole time.⁵ If the servant institutes suit

¹ *King v. Steiren*, 44 Pa. St. 99; 84 Am. Dec. 419; *Gillis v. Space*, 63 Barb. 177; *Polk v. Daly*, 14 Abb. Pr., N. S., 156; *Costigan v. Mohawk R. R. Co.*, 2 Denio, 609; 43 Am. Dec. 758; *Horn v. Land Ass'n*, 22 Minn. 233; *De Leon v. Echeverria*, 45 N. Y. Sup. Ct. 610; *Pond v. Wyman*, 15 Mo. 175; *Nearns v. Harbert*, 25 Mo. 352; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Hearne v. Garrett*, 49 Tex. 619; *Byrd v. Boyd*, 4 McCord, 246; 17 Am. Dec. 740; *Saxonia Mining Co. v. Cook*, 7 Col. 569. In an action for damages for a wrongful discharge, the burden is on the master to show that the discharge was for good cause: *Koenigkraemer v. Missouri Glass Co.*, 24 Mo. App. 124.

² *Greenl. Ev.*, sec. 261 a, and cases cited; *King v. Steiren*, *supra*. See *Hunt v. Crane*, 33 Miss. 669; 69 Am. Dec. 381.

³ *Heim v. Wolf*, 1 E. D. Smith, 70;

Willoughby v. Thomas, 24 Gratt. 522; *Gillis v. Space*, 63 Barb. 177; *Sugg v. Blow*, 17 Mo. 359; *Huntington v. R. R. Co.*, 33 How. Pr. 416; *Sutherland v. Wyer*, 67 Mo. 64.

⁴ *Sherman v. Trans. Co.*, 31 Vt. 162; *Willoughby v. Thomas*, 24 Gratt. 552; *Gillis v. Space*, 63 Barb. 177.

⁵ *Richardson v. Eagle Mac. Works*, 78 Ind. 422; 41 Am. Rep. 585. A servant wrongfully discharged before the expiration of the term for which he was hired cannot recover on the theory of constructive service, but must claim damages for his wrongful discharge: *Bennett v. St. Louis Car Rooting Co.*, 23 Mo. App. 587; *James v. Allen County*, 44 Ohio St. 226; 58 Am. Rep. 821. One hiring another to work one month for a stipulated sum, and discharging him before the end of the month without sufficient cause, is liable to pay him for the full month: *Dunn v. Hereford*, 1 Wy. Ter. 206.

and recovers judgment before the expiration of the term for which he was hired, this will operate as a bar to any subsequent action.¹ Thus if a person hired for three years is discharged during the second quarter, sues to recover for arrears of wages and damages for breach, and recovers a judgment for one quarter's wages, this will be a bar to a second suit upon the same contract, for wages of the subsequent quarter of the first year, and damages.² Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments, but only for breach of contract, and one recovery is a bar.³ Where the employer agrees with the

A servant dismissed from his master's employment before the expiration of the term contracted for cannot maintain an action to recover wages subsequently accruing; his remedy is an action for damages for breach of the contract: *Weed v. Burt*, 78 N. Y. 191. In *Gordon v. Brewster*, 7 Wis. 355, the plaintiff was employed as superintendent of a lumbering establishment for five years at a salary of two thousand a year. At the end of the first year he was discharged. He immediately instituted suit to recover damages for the balance of the term. He afterwards obtained employment at a yearly salary of one thousand dollars. The trial took place while he was thus employed. A verdict of four thousand dollars was rendered in favor of plaintiff, on the theory that the state of facts existing at the time of trial would continue until the end of the term of his first engagement. In reversing the judgment, the supreme court said: "In any business the price of labor fluctuates greatly within four years; particularly is this true of the lumbering business in this country. Now suppose the respondent could only obtain for his services next year five hundred dollars, and so on, would it not be unjust to say he should only recover according to the rule adopted by the jury in this case? Or suppose the value of labor should rise so that he could obtain for his services two thousand dollars or two thousand five hundred dollars a year, what then would be his loss by the failure of the

appellant to fulfill his contract? Still another difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? In ascertaining the amount of damages on his contract running four years, we do not think the court and jury were authorized in assuming that the same state of things existing at the time of trial would continue until the expiration of the contract. Had the respondent seen fit to wait before bringing his action until the period had elapsed for the complete performance of the agreement, the measure of compensation could then have been easily arrived at. . . . But as the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received or might have reasonably earned in the mean time. This rule appears to us to be the most equitable and safe of any that occurs to our minds, and the one most likely to effect substantial justice between the parties."

¹ *Booge v. Pacific R. R. Co.*, 33 Mo. 212; 82 Am. Dec. 160; *Soursin v. Salorgne*, 14 Mo. App. 486.

² *Colburn v. Woodworth*, 31 Barb. 381; *Booge v. Pacific R. R. Co.*, 33 Mo. 213; 82 Am. Dec. 160; *contra*, *Isaacs v. Davies*, 68 Ga. 169.

³ *James v. Allen County*, 44 Ohio St. 226; 58 Am. Rep. 821.

servant that if after trying him three months the master is satisfied, a year's salary will be paid him "just as if he had worked for a full year," and then without cause discharges the servant, the servant is entitled to the whole yearly salary.¹ A master cannot set up the unskillfulness or dishonesty of the servant in an action for his wages. His remedy was to have discharged the servant.²

ILLUSTRATIONS.—A wrote to B, who was in the Sandwich Islands, offering him fifteen hundred a year to serve him in Chicopee, Massachusetts. B accepted and removed to Chicopee, but A refused to receive him. *Held*, that B could not recover for the time consumed in or the expenses of the journey. He could only claim to be placed in as good a condition as he would have been if the contract had been performed: *Noble v. Ames Mfg. Co.*, 112 Mass. 497. A plaintiff had been employed by the defendant for one year at a specified salary, payable in monthly installments, and before the year expired he was discharged, and afterwards, before the end of his term, he brought suit, claiming that the contract was still in force, and that he was and had been ready and willing to perform. *Held*, that he could only recover for the installments that had matured at the time the suit was brought, notwithstanding the term had expired before the cause was tried. If, when he was discharged, he had terminated the agreement, and sued on the breach of the contract, and the cause was not tried until the term had expired, and it had then appeared that he had been unable to procure employment during the time, it may be that he could have recovered for all the damage he had sustained during the term by the breach of the contract: *Hamlin v. Race*, 78 Ill. 422; In an action for discharge from employment, plaintiff proved a contract for one year, and that he did his work properly, and was paid up to the time of his discharge before the expiration of the year. *Held*, that it was error to award a nonsuit: *Alexander v. Americus*, 61 Ga. 36.

§ 277. **Servant Bound to Seek Other Employment.**—

The discharged servant is bound to make reasonable efforts to obtain employment elsewhere.³ But the servant

¹ *Wachs v. Friedmann*, 11 Mo. App. 602.

² *Clark v. Fensky*, 3 Kan. 389; *Turner v. Kouwenhoven*, 29 Hun, 232.

³ *Sherman v. Trans. Co.*, 31 Vt. 162; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Polk v. Daly*, 14 Abb. Pr., N. S., 156; *Fowler v. Armour*, 24 Ala. 194; *Steinberg v. Gebhardt*, 41 Mo.

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is only bound to seek employment of the same general nature as that in which he is employed, and in the same place.¹ A general laborer would be required to seek

520; *Benziger v. Miller*, 50 Ala. 206; *Booge v. Railroad Co.*, 33 Mo. 212; 82 Am. Dec. 160; *Gillis v. Space*, 63 Barb. 177; *Gazette Printing Co. v. Morsa*, 60 Ind. 153; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Armfield v. Nash*, 31 Miss. 361; *Chamberlin v. Morgan*, 68 Pa. St. 168. In *Shannon v. Comstock*, 21 Wend. 457, 34 Am. Dec. 262, Cowen, J., said: "Her we have a contract to sell labor and services. On the vendee declining them, the vendor sells them to another, or converts them to his own use; in other words, he goes about his business in another direction, which fetches him the same, or nearly the same, or more perhaps, than the agreed price, which has failed. This is necessarily so, unless the vendor of the labor choose to lie idle for the supposed length of time which performance would have demanded. But that he has no right to do. The rule of this subject is well laid down by Mellen, C. J., in *Miller v. Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341. 'In general, the delinquent party is holden to make good the loss occasioned by the delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less, he may recover the difference, with commissions and other expenses of resale from the purchaser. If the party entitled to the benefit of a contract can protect himself from the loss arising from a breach at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omits to do so, regardless of the increased amount of damages, for which he may intend to hold the other contract party liable.' The reason and justice of these remarks are

open to continued illustration in the affairs of men. A mason is engaged to work for a month, and tenders himself and offers to perform, but his hirer declines his service. The next day the mason is employed at equal wages elsewhere for a month. Clearly his loss is but one day, and it is his duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continue idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance."

¹ *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8; *Walworth v. Pool*, 9 Ark. 394; *Beckman v. Drake*, 2 H. L. Cas. 606; *Fuchs v. Koerner*, 107 N. Y. 529. In *Costigan v. Mohawk R. R. Co.*, 2 Denio, 609, 43 Am. Dec. 758, the court said: "The defendants had agreed to employ the plaintiff in superintending a railroad, . . . and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence to engage in business of the same character with that in which he had been employed by the defendants." So in *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8, the court say: "We must not be understood as intimating that he is under the duty of engaging in or accepting any other employment than such as may be of the same nature and description of that in which he was employed by the defendant; or employment of that kind at a place different from that in which the employment of the defendant contemplated his remaining during the term. The father hiring his minor son as a clerk to a merchant may justly be presumed to have in view the acquirement by the son of knowledge and skill in that particular business. This will often be a more material consideration than the wages the son can earn during minority. That for the son there was offered, or could with reasonable exertions have been obtained, employment as a la-

general work. But a carpenter would not be compelled to do the work of a farm laborer, or an actor the work of a clerk,¹ or a physician the work of a dentist, or a superintendent of a railroad the work of a conductor,² or an overseer the work of a day-laborer,³ or a foreman in a type foundry the work of a common hand,⁴ or a head gamekeeper the work of assistant gamekeeper.⁵ It is no defense to a claim for damages for being discharged from employment in manufacturing at a fixed salary, that after his discharge plaintiff refused an offer of employment to sell goods of a different kind on commission.⁶ He need not go beyond the neighborhood where he was employed. His duty is to seek and accept work only in the same vicinity. Thus a teacher is not bound to leave her home to find employment,⁷ or a railroad superintendent the community where employed,⁸ or an actor a city where he was to perform,⁹ or an overseer the vicinity in which he was to do service.¹⁰ But while the master may reduce the damages by showing that the servant obtained or could have obtained other employment, this cannot defeat his right of recovery.¹¹ If he fails to get it and does work for himself, its value cannot be deducted from

borer on a farm, or as the employee of a railroad company, or a workman in a machine-shop, or as an operative in a factory, or in any service not of the same kind, and not affording to the son like advantages for the acquirement of knowledge and skill as a merchant, cannot and ought not to furnish a ground for the diminution of the plaintiff's recovery. There is much of personal trust and confidence reposed by a father in engaging his son in the service of another. It must be, if sheer indifference to the welfare of the son is not imputed, a material ingredient of all such contracts. Because of the personal trust which enters into a contract of apprenticeship, the law holds it is not assignable by the master: *Tucker v. Magee*, 18 Ala. 99. Any reasonable objection because of capacity, reputation, mode of dealing, and transacting business, or of habits

or morals, which could be made to the person from whom employment could be obtained, would afford a justification to the plaintiff for rejecting it when offered, or excuse him from not making exertion to secure it."

¹ *Polk v. Daly*, 14 Abb. Pr., N.S., 156.

² *Costigan v. Railroad Co.*, 2 Denio, 609; 43 Am. Dec. 758.

³ *Walworth v. Pool*, 9 Ark. 394.

⁴ *Gillis v. Space*, 63 Barb. 177; *Beckham v. Drake*, 2 H. L. Cas. 607.

⁵ *Ross v. Pender*, 1 Ses. Cas. S., 4th series, 352.

⁶ *Fuchs v. Koerner*, 52 N. Y. Sup. Ct. 77.

⁷ *Gillis v. Space*, 63 Barb. 177.

⁸ *Costigan v. Railroad Co.*, 2 Denio, 609; 43 Am. Dec. 758.

⁹ *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285.

¹⁰ *Walworth v. Pool*, 9 Ark. 394.

¹¹ *Wilkinson v. Black*, 80 Ala. 329.

the amount of his claim.¹ A master having discharged a servant has no right to recall him on pain of forfeiting all claim for compensation; but if the servant is not otherwise employed, he may recall him to do a part of the stipulated work without restoring him to his former position.²

ILLUSTRATIONS. — A hired B for a year, and discharged him before the end of the year. B sued for breach of contract. *Held*, that A was entitled to prove that afterwards, within the year, he again offered B employment, which B refused, as this would diminish damages: *Bigelow v. American Forcible Powder Mfg. Co.*, 39 Hun, 599.

§ 278. **Waiver by Servant of Wrongful Discharge.** — A servant may by acquiescing in a wrongful discharge waive his right to sue for damages,³ but an involuntary acquiescence will not bar him, as where a servant was ordered by the master to send in his resignation, as he was to be dismissed any way, and he did so.⁴

ILLUSTRATIONS. — A made a contract with B for a year's service. Before the expiration of the year, A by letter discharged B, and inclosed in the letter a check in settlement for a certain amount, requesting B to return the check if the amount was not satisfactory. B kept the check and used it, and after the expiration of the year sued A for a year's salary, crediting him with the amount of the check. *Held*, that the action could not be maintained: *Hutton v. Stoddart*, 83 Ind. 539. Plaintiff, being employed by defendant as its state agent for Wisconsin for a term of one year from April 1, 1877, was notified by defendant's vice-president, under date of December 14, 1877, that, for reasons stated (not implying any dissatisfaction with plaintiff), the directors had concluded that at least for the next calendar year the agency for Wisconsin must be added to the duties of the person who was then defendant's state agent in an adjoining state; and added that defendant's general agent was then in the West, and would probably visit plaintiff in a few days, when "all matters relating to the future" could "be arranged between" him and plaintiff. Plaintiff immediately answered at length, expressing acquiescence in the necessity for the change, and giving no intimation that he should claim

¹ *Harrington v. Gies*, 45 Mich. 374.

² *Mitchell v. Toale*, 25 S. C. 238; 60 Am. Rep. 502.

³ *Hutton v. Stoddart*, 83 Ind. 539.

⁴ *Cumberland etc. R. R. Co. v. Slack*, 45 Md. 161.

his salary after January 1, 1878. On December 19, 1877, he sent out circulars to defendant's subordinate agents in Wisconsin, stating that on January 1st next the relations existing between him and them would be dissolved "by expiration of engagement"; and commending to them the state agent who was to succeed him. *Held*, that these papers showed a termination of plaintiff's employment with his consent; and he could not recover salary for the remainder of the year covered by his contract: *Southmayd v. Watertown Fire Ins. Co.*, 47 Wis. 517.

§ 279. **Waiver by Master of Breach or Forfeiture.**—A master may waive a breach of contract by the servant, or condone a ground of discharge.¹ Keeping the servant in his service after knowledge of such breach raises an inference of waiver on his part.² Where an employee was to receive payment at a specified rate if he continued temperate and faithful in the employer's service, it was held that the fact that he was occasionally intemperate and discontinued the service for short periods would not prevent his recovering the stipulated rate for the time actually spent in such service, if he was received back into it, and continued therein, without any new arrangement being made, or any intimation given that the old one was terminated.³ So a master may waive a forfeiture of wages for leaving his service before the end of the term, by a tender of payment or by making part payment, or by any acts on his part showing that he recognizes a liability.⁴ But the waiver of one breach does not estop the master as to a subsequent breach;⁵ and the retention of a servant whose torts have injured the master does not waive his right of action against the servant for damages.⁶

¹ *Brown v. Kimball*, 12 Vt. 617.

² *Harrington v. Bank*, 1 Thomp. & C. 363; *Ridgway v. Market Co.*, 3 Ad. & E. 171; *Jones v. Trinity Parish*, 19 Fed. Rep. 59.

³ *Prentiss v. Ledyard*, 28 Wis. 131.

⁴ *Patnote v. Sanders*, 41 Vt. 66; *Pelouze v. Stewart*, 1 N. Y. Leg. Obs.

170; *Dover v. Plemmons*, 10 Ired. 23; *Seaver v. Morse*, 20 Vt. 620; *Cahill v. Patterson*, 30 Vt. 592; *Boyle v. Parker*, 46 Vt. 345; *Hogan v. Titlow*, 14 Cal. 255; *Rice v. Dwight Mfg. Co.*, 2 Cush. 80.

⁵ *Hunter v. Gibson*, 3 Rich. 161.

⁶ *Stoddard v. Treadwell*, 26 Cal. 294.

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ILLUSTRATIONS.—A agreed with B to serve him as overseer for a certain term, and to abstain during the term from all intoxication, under a penalty of forfeiture of his wages "if he got drunk and was dismissed." A did repeatedly get drunk, and was finally dismissed. *Held*, that a failure of B to take advantage of the first act of drunkenness was not a waiver of the provision of forfeiture, and that A could not recover on a *quantum meruit* for his services: *Hunter v. Gibson*, 3 Rich. 161. A laborer did work under a contract to work for a specified period, but left before the time expired, and the parties afterwards met and attempted to settle, and the employer offered to pay the laborer for the time he had worked if he would make a certain deduction for damages, which he refused to make, and the parties separated. *Held*, that this was not a waiver of the special contract on the part of the employer: *Monell v. Burns*, 4 Denio, 121.

§ 280. **Causes Which will Justify Servant in Abandoning Service.**—The servant is justified in leaving the service before the end of his term, upon the breach by the master of any of the express provisions of the contract. The same is true as to those provisions which the law incorporates into every contract of service. These are, among others: Assaulting him even without a battery, where the servant fears injury if he continues;¹ charging the servant wrongfully with committing a crime;² employing him in unlawful³ or unreasonably dangerous services;⁴ or in work not contemplated in the hiring;⁵ the existence of an epidemic in the neighborhood;⁶

¹ *Bishop v. Ranney*, 59 Vt. 316. A master has no right to use "moderate force" to compel his servant, a girl of eighteen, to obey his reasonable commands: *Tinkle v. Dunivant*, 16 La. 503.

² *Longmuir v. Thompson*, 11 Shaw, 571.

³ *Warner v. Smith*, 8 Conn. 14; *Commonwealth v. St. German*, 1 Browne, 24; *Berry v. Wallace, Wright*, 657.

⁴ *Wood on Master and Servant*, sec. 83; *Eagle etc. Co. v. Welch*, 61 Ga. 444.

⁵ *Baron v. Placide*, 7 La. Ann. 229.

⁶ *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77, *Hathaway, J.*, saying: "The plaintiff contends that he was

excused from the performance of his contract, and justified in quitting when he did by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity of the mills, and that he is entitled to a reasonable compensation for the labor performed. If the fulfillment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged. If he was prevented by sickness or similar inability, he may recover for what he did on a *quantum meruit*: 1 *Parsons on Contracts*, 524. The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing

exposing the servant to dangers, physical and moral, even without the master's fault;¹ failing to provide him with proper food and lodging;² fault-finding by the master, if severe and unjustifiable, and the servant does not waive it by remaining in the service;³ treating him improperly and inhumanely;⁴ refusing to pay him his wages.⁵

ILLUSTRATIONS.—A female servant left her employment because of the continued annoyance and rudeness towards her of a relative of the employer. This relative lived in the same house, but the employer had no control over him. *Held*, justifiable: *Patterson v. Gage*, 23 Vt. 558; 56 Am. Dec. 96.

§ 281. **Dissolution of Contract—By Expiration of Time or Consent of Parties.**—The contract of service is ended by the expiration of the time limited. The servant has then the right to leave.⁶ But the fact that he honestly thinks that the time has expired will not excuse him if the fact was otherwise.⁷ So the contract, before its expiration, may be ended by the consent of the parties, express or implied,⁸ and if the master consents, he can-

epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it; nor does it make any difference that the men who remained there at work after the plaintiff left were healthy and continued to be so. He could not then have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must necessarily have acted at his peril, under the guidance of his judgment. The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as then existing. When the laborer has adequate cause to justify an omission to fulfill his contract, such omission cannot be regarded as his fault. Whether or not the plaintiff had such cause was a question of fact, to be determined by the jury upon the evidence."

¹ *Patterson v. Gage*, 23 Vt. 558; 56 Am. Dec. 96.

² *Gillis v. Space*, 63 Barb. 177. If the employer furnish a suitable room, it is enough even though it does not suit the taste of the servant: *Illinois College v. Perry*, 8 Ill. App. 188.

³ *Brown v. Kimball*, 12 Vt. 617. But harsh language by an employer is no sufficient excuse for breaking a contract to labor a specific time at a fixed price: *Forsyth v. Hastings*, 27 Vt. 646.

⁴ *McGrath v. Herndon*, 4 T. B. Mon. 480; *Newman v. Bennett*, 2 Chit. 195; *Matthews v. Terry*, 10 Conn. 455.

⁵ *Dobbins v. Higgins*, 78 Ill. 440; *R. R. Co. v. Spureck*, 24 Ill. 588; *Canal Co. v. Gordon*, 6 Wall. 561; *Lefrancois v. Charbonnet*, 5 Rob. (La.) 185; 39 Am. Dec. 533.

⁶ *Wood on Master and Servant*, sec. 159.

⁷ *Winn v. Southgate*, 17 Vt. 355.

⁸ *Wood on Master and Servant*, sec. 164; *Boyle v. Parker*, 46 Vt. 343.

not set up that the servant left before the end of his term, in answer to his claim for wages for the time served.¹ The master's consent may be implied from his acts.²

ILLUSTRATIONS. — A lady engaged a servant upon condition that she obtained a certificate of good character from her last master. *Held*, that no recovery could be had if the certificate was not obtained, for refusing to receive her: *Forbes v. Milne*, 6 Shaw, 75. The defendant agreed to serve the plaintiff as a traveler and agent "for twelve months certain," after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice. *Held*, that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three months' notice only applied in case the engagement was prolonged beyond the twelve months: *Langton v. Carleton*, L. R. 9 Ex. 57. Before the end of his term the servant told his master that he was going to quit. The master did not object, but said there were as good men to be had as he was. *Held*, that the servant could recover for the time served: *Boyle v. Parker*, 46 Vt. 343. The servant, before the end of his term, asked his employer if he wanted him to work any longer. The master said he might do as he pleased. *Held*, not a consent to his leaving: *Winn v. Southgate*, 17 Vt. 355. Before the end of his term the servant quit. Afterwards the master said that he was glad he had gone, as he was worth nothing to him. But though he had previously manifested a wish to get rid of him, he had never told him to go. *Held*, that the servant had no right to leave: *Decamp v. Stevens*, 4 Blackf. 24. The agent of a railroad company employed A to guard certain convicts. Then the company leased the convicts to B, who agreed to assume the responsibility of guarding them. Of this A had no notice. *Held*, that the company was bound to pay A for his services, and that the fact that the agent who hired A became B's agent was immaterial: *Marietta and North Georgia R. R. Co. v. Hilburn*, 75 Ga. 379.

§ 282. When Service may be Dissolved by Either Party.—The service may be determined by either party at any time in these cases: 1. Where the continuance of

¹ *Patnote v. Sanders*, 41 Vt. 66; 98 Thomas v. Williams, 1 Ad. & E. Am. Dec. 564; *Rogers v. Steele*, 24 685.

Vt. 513; *Green v. Hulett*, 22 Vt. 188; ² *Boyle v. Parker*, 46 Vt. 343.

the term is discretionary;¹ 2. Where the term is indefinite;² 3. Where the contract is not mutual.³

§ 283. **Dissolution of Partnership.**—The dissolution of a partnership releases a servant of the partnership.⁴ If, however, the dissolution is by the act of the parties, they are liable to the servant;⁵ but if the dissolution is by the death of one of the partners, they are not liable.⁶ And if the firm is not dissolved,—though one partner goes out voluntarily or by death,—the contract is not ended.⁷ A master by taking a partner in his business does not dissolve his contract with a servant.⁸ If a contract for personal service for a certain sum per month, and a further sum at the end of the year, and a proportionate part of the latter sum if the contract become void by death or mutual consent, be broken by the voluntary dissolution of the partnership, the firm is liable for a proportional part of the sum that was to be paid at the end of the year.⁹ Where, pending the term of a clerk's service, his employer enters into partnership with another, and the clerk enters into the service of the firm, his contract with his original employer is at an end; and if, afterwards, he is discharged, he cannot recover of his original employer.¹⁰

§ 284. **Bankruptcy of Master.**—The bankruptcy of the master dissolves the contract.¹¹ Where a written contract between a salesman and his employers provided that the salesman, in consideration of a stipulated salary for two successive years, should devote his whole time and

¹ *Provost v. Harwood*, 29 Vt. 219; *Patrick v. Putnam*, 27 Vt. 759; *Durbin v. Baker*, 32 Me. 273; *Daveny v. Shattuck*, 9 Daly, 66.

² *De Briar v. Minturn*, 1 Cal. 450; *Coffin v. Landis*, 46 Pa. St. 430; *Peacock v. Cummings*, 40 Pa. St. 434; *Harper v. Hassard*, 113 Mass. 187; *Blaisdell v. Lewis*, 32 Me. 515; *Thayer v. Wadsworth*, 19 Pick. 349.

³ *Dunn v. Sayles*, 5 Q. B. 685.

⁴ *Wood on Master and Servant*, sec. 165.

⁵ *Id.*

⁶ *Id.*; *contra*, *Ferreira v. Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496.

⁷ *Id.*

⁸ *Harkins v. Smith*, 13 Jur. 381.

⁹ *Redheffer v. Leathe*, 15 Mo. App. 12.

¹⁰ *Anderson v. Freeman*, 75 Ga. 93.

¹¹ *Wood on Master and Servant*, sec. 163.

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attention to the employers' business, it was held that this did not raise an implied obligation upon the employers to continue the engagement for two years; and that, on their going into bankruptcy during the first year, the salesman could not recover his contract compensation beyond that time.¹

§ 285. **Abandonment by Servant.**—Also the abandonment of the service by the servant ends the contract.²

§ 286. **Dismissal by Master.**—So does the dismissal of the servant for cause;³ and where the servant is wrongfully discharged, the contract is so far ended that the master could not compel him to resume his service.⁴ A master cannot, while repudiating his contract with the servant to serve for a definite period of time, reduce the servant's right of recovery to merely nominal damages, by showing that he offered the servant the same work at the same price for a less period than that for which he was hired. Thus where one is hired for a year and discharged, but the master offers the servant the same work at the same price, but by the week, the servant is not bound to accept it.⁵ An employer may countermand the doing of work which he has engaged another to do, and if he does so, and the servant nevertheless goes on and completes it, he cannot recover for his labor after the countermand, but only damages which he has suffered by the breach of his contract.⁶ Where a contract of hiring provides that if the servant remains after a year in the master's employ his wages shall be higher, and that the master may discharge him at any time, the reasons of the master for discharging him are immaterial, at least

¹ Orr v. Ward, 73 Ill. 318.

² Wood on Master and Servant, sec. 602.

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³ Green v. Hulett, 22 Vt. 188.

⁴ Wood on Master and Servant, sec. 161.

⁵ Wachs v. Friedmann, 11 Mo. App.

602.

⁶ Clark v. Marsiglia, 1 Denio, 317; 43 Am. Dec. 670; Lord v. Thomas, 64 N. Y. 110; Owen v. Frink, 24 Cal. 178.

where there is no pretense of fraud.¹ The words, "I am very sorry to have to ask you to resign your position," in a letter from an employer to an employee, are properly construed as a peremptory discharge.²

§ 287. **By Death or Disability.**—The death of either party or the permanent sickness of the servant ends the contract.³

§ 288. **Rights of Master — Injuries to Servant by Third Person.**—At common law in England, the master had an action against a third person who unlawfully injured or interfered with his servants. This right, however, was restricted to menial servants—those to whom the master stood in somewhat the relation of a parent—*in loco parentis*.⁴ At the present time a master has a right of action against any person who injures his servant whereby he suffers an actual loss.⁵ Thus the master may sue a car-

¹ Smith v. Buffalo Street R. R. Co., 35 Hun, 204.

² Jones v. Graham and Merton Transp. Co., 51 Mich. 539.

³ Clark v. Gilbert, 26 N. Y. 279; 84 Am. Dec. 189; Hubbard v. Belden, 27 Vt. 645; Yerrington v. Greene, 7 R. I. 589; 84 Am. Dec. 578. A clerk is hired for a term of three years at a stipulated salary, to carry on a branch store for his employer. Before the end of the term the employer dies. The contract is terminated, and no recovery against the estate of the employer can be had: Yerrington v. Greene, *supra*.

⁴ See remarks of Wright, J., in Burgess v. Carpenter, 2 S. C. 7; 16 Am. Rep. 643.

⁵ Wood on Master and Servant, secs. 221, 223; Dennis v. Clark, 2 Cush. 347; 48 Am. Dec. 671; Drew v. R. R. Co., 26 N. Y. 49; Ford v. Munroe, 20 Wend. 210. In Woodward v. Washburn, 3 Denio, 369, the court says: "It is enough that the relation of master and servant exists between the plaintiff and the person who is disabled or prevented from performing the service he has contracted to per-

form by the tortious act of the defendant. It is not necessary to sustain such action to show that the person whose service had been lost by the plaintiff was either his apprentice or child. The reason and foundation upon which this doctrine is built seem to be the property that every man has in the services of those whom he has employed, acquired by the contract of hiring, and purchased by giving them wages. The point of the argument of the counsel for the defendant on this part of the case is, that the relation of master and servant cannot exist *quoad* this action, except between apprentice and master, parent and child, or unless the plaintiff stands in the place of a parent to the one from whom service is due. It seems to be conceded when that relation exists, and the master has sustained loss of service by his servant being disabled by the tortious acts of the defendant, that the action lies. Chancellor Kent, in considering the relation of master and servant, subdivides the several kinds of persons who come within the description of servants into first, slaves; second, hired servants;

rier for injuries to a servant while being carried by it,¹ or a person whose vicious dog or other animal bites or injures his servant.² A railroad company may sue a person who maliciously arrests one of its engineers while running the train for the purpose of delaying it.³ One engaging the servant of another in an obviously dangerous task is responsible to the master for any injury received by him while so engaged, even though the servant was negligent.⁴ No actual contract to serve need be proved,—it is enough for the master to show that at the time of the injury he was having the benefit of the servant's labor.⁵ Where the injury results in the immediate death of the servant, the master has no right of action at common law.⁶ This is but one phase of the common-law rule as to actions for the death of another,—a rule which now both in America and England has been altered by statute.

ILLUSTRATIONS. — A clerk went to a bank on business shortly before the closing hour, and while he was there the doors were closed and he was refused exit for some time. *Held*, that an action against the bank for loss of services by the employer of the clerk would lie: *Woodward v. Washburn*, 3 Denio, 369.

§ 289. **Enticing Servant from Employment.**—And it is now held, both in this country and in England, that an action will lie by the master against another who knowingly entices away his servant, or induces him to break his contract of service.⁷ An action will lie for enticing

and third, apprentices. In regard to the second description, the learned commentator says: 'The relation of master and servant rests altogether upon contract. The one is bound to render the service, and the other to pay the stipulated consideration.' And again: 'In England, there seems to be a distinction between menial and some other servants, but I know of no legal distinction between menial or domestic and other hired servants': 2 Kent's Com., 4th ed., pp. 258 et seq.

¹ *Ames v. Union R. R. Co.*, 117 Mass. 541; 19 Am. Rep. 426.

² *McCarthy v. Guild*, 2 Met. 291; *Dennis v. Clark*, 2 Cush. 347; 48 Am. Dec. 671.

³ *Railroad Co. v. Hunt*, 55 Vt. 570; 45 Am. Rep. 639.

⁴ *Louisville etc. R. R. Co. v. Willis*, 83 Ky. 57; 4 Am. St. Rep. 124.

⁵ *Evans v. Walton*, 36 L. J. Com. P. 307; *Martinez v. Gerber*, 3 Man. & G. 88.

⁶ *Wood on Master and Servant*, sec. 223; see *Personal Rights and Remedies*, *post*, Division II.

⁷ *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 783; *Walker v. Cronin*,

away a servant at will, when a subsisting service is interrupted by the act of the defendant.¹ But a person has a right to employ another's servant after he has actually left his employer, or after his term has expired, even though but for the new offer he would have remained in the same service another term.² After an infant has disaffirmed his voidable contract for personal services, a person who employs him is not chargeable with the offense.³ An action on the case brought by a father for the enticing away of his son from his service is not supported by proof that the defendant, knowing that the son had left his father's service without his father's consent, induced him to enter into the service of the defendant, and detained him when he wished to return.⁴ The measure of damages for enticing away the servant of another, who is hired by the year, where that other fails to supply the servant's place, is the direct loss suffered, and the average net profits that were made by men of fair business capacity, out of the labor of such a servant during the year for which the enticed servant was hired.⁵ A master may recover damages of any one who, after demand made, detains a servant.⁶ Under a count for harboring or entertaining a servant, evidence of enticement is not necessary.⁷

ILLUSTRATIONS.—Defendant, for the purpose of injuring plaintiff and of inducing him to abandon a lease of a planta-

107 Mass. 555; *Jones v. Blocker*, 43 Ga. 331; *Sabter v. Howard*, 43 Ga. 601; *Lumley v. Gye*, 2 El. & B. 216; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Daniel v. Swearingen*, 6 S. C. 297; 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82; 40 Am. Rep. 680; *Butterfield v. Ashley*, 2 Gray, 254; *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Melburne v. Byrne*, 1 Cranch C. C. 239; *Haight v. Badgely*, 15 Barb. 499; *contra*, *Burgess v. Carpenter*, 2 Rich. 7; 16 Am. Rep. 643.

¹ *Noice v. Brown*, 39 N. J. L. 569.

² *Sykes v. Dixon*, 9 Ad. & E. 693;

Hart v. Aldridge, Cowp. 54; *Nichols v. Martyn*, 2 Esp. 732; *Boston Glass Co. v. Binney*, 4 Pick. 425. The Tennessee statute covers the case of one who hires without knowledge of a previous contract of hire, if he fails to discharge the laborer on being notified that the latter is under a contract or has violated it: *Morris v. Neville*, 11 Lea, 271.

³ *Langston v. State*, 55 Ala. 114.

⁴ *Butterfield v. Ashley*, 2 Gray, 254.

⁵ *Lee v. West*, 47 Ga. 311.

⁶ *Ferrell v. Boykin*, Phill. (N. C.) 9.

⁷ *Dubois v. Allen*, Anth. 128.

tion, persuaded and threatened plaintiff's laborers, so that they left him. *Held*, that defendant was liable for the damage thus sustained: *Dickson v. Dickson*, 33 La. Ann. 1261. On the trial of an action for enticing away plaintiff's servants, it appeared that defendant's conduct was of an aggravated character. *Held*, that a verdict for the net profits which plaintiff would have realized but for defendant's conduct, and for plaintiff's loss by reason of his inability to improve his property, was properly rendered, and not excessive: *Smith v. Goodman*, 75 Ga. 198.

§ 290. **Combinations among Workmen.**—Every man has a right to work for whom he pleases, and on what terms he pleases. He may refuse to deal with a particular man or class of men. It is perfectly legal for any number of persons, without an unlawful object in view, to agree that they will not work for or deal with certain persons, or under a fixed price, or without certain conditions.¹ The test is the legality of the intent. Thus it

¹ *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Boston Glass Co. v. Binney*, 4 Pick. 425; *Bowen v. Matheeson*, 14 Allen, 499. This subject lies more properly in the criminal law, — the law of conspiracy. For a learned discussion of the law as to conspiracies to control wages of workmen, see *People v. Fisher*, 14 Wend. 9, and note in 28 Am. Dec. at page 507. *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346, is a leading case. Here Shaw, C. J., says: "The defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person not a member of such society after notice given him to discharge such workman. The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged.

Such an association might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, and social condition; or to make improvement in their art, or for other proper purposes; or the association might be designed for the purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of a criminal conspiracy, it must be averred and proved that the actual if not the avowed object of the association was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement, communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume. But to make such an association,

has been held that an agreement between members of a society not to ship sailors below a specified rate of wages is not criminal,¹ nor an agreement not to teach a new hand the trade of the members without the consent of the society.² But, on the other hand, a conspiracy to obtain a sum of money from an employer by inducing his workmen to leave him, and deterring others from engaging with him, is illegal.³ Any association, in short, designed to coerce workmen to become members, or to dictate terms to employers on which their business shall be conducted, by means of threats of loss, interference with their property, traffic, or lawful employment of other persons, is *pro tanto* an illegal combination, and any doings in furtherance of such design accompanied by damage are actionable.⁴

ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so is to be averred and proved as the gist of the offense. But when an association is formed for purposes actually innocent, and afterward its powers are abused by those who have the control and management of it to purposes of oppression and injustice,

it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association."

¹ *Brown v. Matheson*, 14 Allen, 503.

² *Snow v. Wheeler*, 113 Mass. 185.

³ *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287.

⁴ *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48.

CHAPTER XXIII.

LIABILITIES OF MASTER AND SERVANT.

- § 291. Master is liable for torts of servant.
- § 292. Willful and malicious acts of servant.
- § 293. Trespases of servant.
- § 294. Who are "servants" within previous sections.
- § 295. Master not liable for acts of independent contractor.
- § 296. Exceptions — Where work is a nuisance or dangerous *per se*.
- § 297. Exceptions — Where duty is imposed by contract.
- § 298. Exceptions — Where duty is imposed by law.
- § 299. Exceptions — Where employer interferes with or directs work.
- § 300. Exceptions — Other cases where employer is liable.
- § 301. Master not liable for injury to servant.
- § 302. Exceptions — Defective machinery, buildings, or appliances.
- § 303. Exceptions — Latent defects and dangers.
- § 304. Duty of railroad companies to servants employed.
- § 305. Knowledge by master of defect necessary.
- § 306. Direct negligence of master.
- § 307. Concurrent negligence of master and fellow-servant.
- § 308. Unsuitable or incompetent fellow-servants.
- § 309. Rule where servant is an infant or minor.
- § 310. Statutory provisions as to liability of master to servant.
- § 311. Servant waives danger by entering or remaining in service knowing of it.
- § 312. *Aliter* where he complains and master promises to remedy.
- § 313. Contributory negligence of servant — Failing to notify master of defect.
- § 314. Contributory negligence of servant — Going into dangerous situation by command of master.
- § 315. Contributory negligence of servant — Other cases of contributory negligence.
- § 316. Contributory negligence of servant — What not contributory negligence in servant.
- § 317. Doctrine of "comparative negligence."
- § 318. Contracts between master and servant as to injuries.
- § 319. Who are "fellow-servants" — Common employment the test.
- § 320. Who are not "fellow-servants."
- § 321. Superior servant having control of inferiors a vice-principal.
- § 322. Servant having charge of construction or repair of machinery used by other servants.
- § 323. Servants of different masters.
- § 324. When relation of master and servant does not subsist — Time.
- § 325. Volunteer assisting servant.
- § 326. Evidence of incompetence of fellow-servant.

- § 327. Evidence of negligence in selecting and maintaining machines and appliances — Cases where it was held sufficiently shown.
 § 328. Same — Cases where it was held not sufficiently shown.
 § 329. Liability of servant to third person.
 § 330. Liability of servant to master.
 § 331. Liability of servant to fellow-servant.

§ 291. **Master is Liable for Torts of Servant.**—A master is liable civilly for wrongs committed by his servant while acting about his business.¹ A master is civilly liable to a statutory penalty for an illegal sale of intoxicating liquor, made by his servant without his knowledge or consent, and against his instruction.² A railroad company is liable for its servant's negligence in leaving down the bars in a fence, where the plaintiff's horses escaped and were killed by a passing train, though the servant was employed as a day-laborer, and his act was done in the night-time, and

¹ *Yates v. Squires*, 19 Iowa, 26; 87 Am. Dec. 418; *Zulkee v. Wing*, 20 Wis. 408; 91 Am. Dec. 425; *Hart v. Railroad Co.*, 1 Rob. (La.) 178; 36 Am. Dec. 689; *Johnson v. Barber*, 5 Gilm. 423; 50 Am. Dec. 416; *Powell v. Deveney*, 3 Cush. 300; 50 Am. Dec. 738; *Pickens v. Drecker*, 21 Ohio St. 212; 8 Am. Rep. 55; *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361; *Black v. Railroad Co.*, 10 La. Ann. 33; 63 Am. Dec. 586; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; 93 Am. Dec. 685; *Donaldson v. Railroad Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446; *Turberville v. Stampe*, 1 Ld. Raym. 26; *Hilsdorf v. St. Louis*, 45 Mo. 94; 100 Am. Dec. 352; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; 97 Am. Dec. 288; *Limpus v. London etc. Omnibus Co.*, 1 Hurl. & C. 520; *Pennsylvania etc. Steam Nav. Co. v. Hungerford*, 6 Gill & J. 291; *Illinois etc. R. R. Co. v. Reedy*, 17 Ill. 582; *Noble v. Cunningham*, 74 Ill. 51; *Cook v. Farham*, 24 Ala. 21; *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Armstrong v. Cooley*, 10 Ill. 509; *Snyder v. Hannibal etc. R. R. Co.*, 60 Mo. 413; *Simons v. Monier*, 29 Barb. 420; *Gil-*

martin v. New York, 55 Barb. 239; *Lannen v. Albany Gas Light Co.*, 46 Barb. 204; 44 N. Y. 459; *Chapman v. New York etc. R. R. Co.*, 31 Barb. 399; 33 N. Y. 369; 88 Am. Dec. 392; *Courtney v. Baker*, 60 N. Y. 1; *Day v. Brooklyn etc. R. R. Co.*, 12 Hun, 435; *Leviness v. Post*, 6 Daly, 321; *Tuel v. Weston*, 47 Vt. 634; *Enos v. Hamilton*, 24 Wis. 628; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Ryall v. Kennedy*, 8 Jones & S. 347; *Harriss v. Mabry*, 1 Ired. 240; *Burns v. Poulson*, L. R. 8 Com. P. 563; *Venables v. Smith*, L. R. 2 Q. B. Div. 279; *Whiteley v. Pepper*, L. R. 2 Q. B. Div. 276; *Pickard v. Smith*, 10 Com. B., N. S., 470; *Booth v. Mister*, 7 Car. & P. 66; *Sadler v. Henlock*, 4 El. & B. 570; 1 Exch. N. S., 677; 24 L. J. Q. B. 138; *Foreman v. Canterbury*, 6 Q. B. 214; *Whatman v. L. R. 3 Com. P. 422*; *Mitchell v. Crassweller*, 13 Com. B. 235; *Wilson v. Rockland Mfg. Co.*, 2 Harr. (Del.) 67; *Tebbutt v. Bristol etc. R. R. Co.*, L. R. 6 Q. B. 73; 19 Week. Rep. 383; 40 L. J. Q. B. 78; *Holmes v. Wakefield*, 12 Allen, 580; 90 Am. Dec. 171.

² *George v. Gobey*, 128 Mass. 289; 35 Am. Rep. 376.

not in the business of the company.¹ But the servant's act must be within the scope of his employment.² The master is not liable while the servant is acting outside of his business.³ A railroad company is not liable for damage to property adjoining its road, by a fire kindled by its section-men for the purpose of cooking their meals while engaged in repairing the track.⁴ One employed to sell goods in his employer's absence, or to superintend his employer's business at a particular store, has no implied authority to arrest and search a person suspected of having stolen goods and secreted them about his person so as to render the employer liable in damages for such an arrest and search.⁵ The owner of a bridge is not liable for injury caused by the bite of a dog belonging to his toll-keeper, if it appears that he did not authorize or require the dog to be kept, and that it was not needed for the conduct or protection of the business in which the owner of the dog was employed.⁶ A master who permits his servant to go to a fair with a horse and cart is not liable for damage arising from the servant's negligent management of the horse.⁷ A father is not liable for injuries caused

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Q. B. 78;
Allen, 580;
Mass. 289;

¹ Chapman v. Railroad Co., 33 N. Y. 369; 88 A.n. Dec. 392.

² Reilly v. Railroad Co., 94 Mo. 600.

³ Mitchell v. Crassweller, 13 Com. B. 236; McManus v. Crickett, 1 East, 106; Wright v. Wilcox, 19 Wend. 343; 32 Am. Dec. 507; Douglass v. Stephens, 18 Mo. 362; McClenagan v. Brock, 5 Rich. 17; Mali v. Lord, 39 N. Y. 381; 100 Am. Dec. 448; McKenzie v. McLeod, 10 Bing. 385; Snyder v. Hannibal etc. R. R. Co., 60 Mo. 413; Hudson v. Missouri etc. R. R. Co., 16 Kan. 470; Lamb v. Lady Palk, 9 Car. & P. 629; Haack v. Fearing, 5 Robt. 528; 35 How. Pr. 459; Wilson v. Peverly, 2 N. H. 548; McCoy v. McKowen, 26 Miss. 487; 59 Am. Dec. 264; Cavanagh v. Dinsmore, 12 Hun, 465; Cousins v. Hannibal etc. R. R. Co., 66 Mo. 572; 6 Cent. L. J. 294; Mitchell v. Crassweller, 13 Com. B. 236; Cantrell v. Colwell, 3 Head, 471; Bard v. Yohn,

26 Pa. St. 482; Campbell v. Providence, 9 R. I. 262; Storey v. Ashton, L. R. 4 Q. B. 476; Rayner v. Mitchell, 2 Com. P. 357; Sleath v. Wilson, 9 Car. & P. 607; Heath v. Wilson, 2 Moody & R. 181; Joel v. Morrison, 6 Car. & P. 501; Goodman v. Kennell, 1 Car. & P. 167; Fatten v. Rea, 2 Com. B., N. S., 606; Lyons v. Martin, 8 Ad. & E. 512; Yates v. Squires, 19 Iowa, 26; 87 Am. Dec. 418; Porter v. Chicago etc. R. R. Co., 41 Iowa, 358; Higgins v. Chesapeake etc. Canal Co., 3 Harr. (Del.) 411. See the sections on Liability of Principal for Acts of Agent, for a fuller exposition of this principle; also Bailments, subtitle Carriers.

⁴ Morier v. Railroad Co., 31 Minn. 351; 47 Am. Rep. 793.

⁵ Mali v. Lord, 39 N. Y. 381; 100 Am. Dec. 448.

⁶ Baker v. Kinsey, 38 Cal. 631; 99 Am. Dec. 438.

⁷ Bard v. Yohn, 26 Pa. St. 482.

by the negligence of his son, who was also his hired man, in insecurely fastening a horse, the property of his father, the son taking the horse without the knowledge of his father, and not being engaged in his business.¹ If a car porter throws a bundle of his own effects out of the car window, the railroad company is not liable to one struck by it.²

ILLUSTRATIONS.—MASTER HELD LIABLE.—A warehouseman employed a master porter to remove a barrel from his warehouse. The master porter employed his own men and tackle. Through the negligence of one of his men, the tackle failed, and the barrel fell on the plaintiff. *Held*, that the warehouseman was liable: *Randleson v. Murray*, 8 Ad. & E. 109. The defendant, owner of an express wagon, employed a driver, with authority to secure and transact such business as he could. The driver, having delivered a trunk, on his return got a load of poles for himself, and while carrying them home on the wagon negligently ran over and injured the plaintiff's child. *Held*, that the defendant was liable: *Mulvehill v. Bates*, 31 Minn. 364; 47 Am. Rep. 796. Defendant was the keeper of a gun store. His servant, a clerk in the store, while engaged, during defendant's absence, in exhibiting a gun to a customer, loaded it, contrary to defendant's orders. In so doing it was accidentally discharged, and shot the plaintiff, who was on the opposite side of the street. *Held*, that the defendant was liable for the injuries: *Garretzen v. Duenckel*, 50 Mo. 104; 11 Am. Rep. 405. A toll-gate keeper, having charge of the gate at all times, but not required to collect toll at night after nine o'clock, let the beam of the gate down upon the plaintiff, who was endeavoring to pass the gate after that hour, and injured him. *Held*, that the company was liable: *Noblesville etc. Road Co. v. Gause*, 76 Ind. 142; 40 Am. Rep. 224. A druggist's clerk gives a customer, by mistake, a poisonous drug instead of the prescription called for, whereby the latter is injured. The master is liable: *Fleet v. Hollenkemp*, 13 B. Mon. 219; 56 Am. Dec. 568. In the absence of his master, a general farm servant, working in his master's cornfield with other servants, undertook to drive out a cow of the plaintiff which had broken into the field, and in so doing negligently struck her with a stone, and killed her while she was in the field. *Held*, that the master was liable: *Evans v. Davidson*, 53 Md. 245; 36 Am. Rep. 400. The plaintiff's horse was killed without negligence of the plain-

¹ *Way v. Powers*, 57 Vt. 135.

Sleeping Car Company, 139 Mass.

² *Walton v. New York Central* 556.

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tiff's servant, who had charge of him, by reason of a span of horses belonging to the defendant, which had run away with his coachman, running against a feed wagon in the public street. *Held*, that although the horses might have run away without any fault or negligence of the defendant's servant, yet the defendant was liable if the servant caused the injury by running against the feed wagon, although he ran against it solely with a view to his own personal safety, provided the act was a prudent one, by which to stop the defendant's horses: *Wolfe v. Mersereau*, 4 Duer, 473. The owner of a lot of land occupied by his servant directed him to summer-fallow a part of it, and in order to prepare the land for the plow, the servant cut down and placed in piles on one side the brush growing upon the premises, and then at a time of unprecedented drought, when the act was negligent in itself, directed his son, a lad, to set fire to the brush heaps, which he did, and thereby fire was communicated to the plaintiff's woods. *Held*, that the removal of the brush was within the scope of the servant's employment; that the act of firing was the act of the servant, and that the master was liable: *Simons v. Monier*, 29 Barb. 419. Defendant, a boiler-maker, had just completed a boiler for a customer. The boiler stood in the street in front of defendant's manufactory, and defendant told his superintendent to test it. The customer asked for a test under 180 pounds pressure; defendant said that 150 pounds was enough. The superintendent said that he would test it "200 anyhow." When the pressure was applied, defendant and the customer had walked away. After a pressure of 198 pounds, the superintendent took hold of and held down the lever, when the boiler exploded, and plaintiff, who was standing in the street, was injured. *Held*, that the act of the superintendent, though reckless and fool-hardy, was within defendant's business: *Ochsenbein v. Shapley*, 85 N. Y. 214. The servants of the proprietor of a blacksmith-shop were guilty of negligence and unskillfulness. He left them in charge of his shop, and they were intrusted by him, in the proprietor's absence, with the task of shoeing his horse, although they were not employed for the purpose of shoeing horses. *Held*, that the proprietor was liable. Finding them in charge and at work, the plaintiff had a right to assume that they had authority and sufficient skill: *Leviness v. Post*, 6 Daly, 321. The owner of a steamboat, the custom on which was to notify passengers when their landings were reached, *held*, to be liable for the negligence of two parties, one representing the officers of the boat, and the other representing the clerk, in directing a lady to disembark at a wrong landing in the night: *Carson v. Leathers*, 57 Miss. 650.

A servant employed by a flour merchant to deliver goods, having started out with a wagon load for different customers, left by the roadside several bags of bran while he went upon a side road to deliver a quantity of flour, intending to take the bran on his return; his object being to save an unnecessary transportation of the bran, and thus finish the delivery sooner, and thus get time to attend to some private business of his own. *Held*, that in leaving the bags by the roadside he was to be regarded as acting in the master's employment, and that the latter was liable for an injury caused by the fright of a horse driven by: *Phelon v. Stiles*, 43 Conn. 426. The occupant of an upper tenement *held* to be liable for damages done to the lower one, by an overflow of water, caused by the negligence of his servant in leaving a faucet open: *Simonton v. Loring*, 68 Me. 164; 28 Am. Rep. 29. Plaintiff's husband, while drunk, lay down on a street-car track, and the driver of the car, though seeing an object which he thought to be a bundle of grain, made no effort to stop his car, in which he could easily have succeeded, but drove directly over the person, and so killed him. *Held*, that the company was liable: *Werner v. Citizens' Ry Co.*, 81 Mo. 368. A master instructed his servant to go to a certain place and kill a beef, and the servant went, and finding no animal there but plaintiff's bull, killed and dressed that. *Held*, that the master was liable: *Maier v. Randolph*, 33 Kan. 340.

ILLUSTRATIONS CONTINUED.—MASTER HELD NOT LIABLE.—

A coachman after having gone on an errand for his master, instead of going back to the stable, used the carriage in going on some business of his own without his master's knowledge, and while so driving injured a person. *Held*, that the master was not liable: *Sheridan v. Charlick*, 4 Daly, 338. A minor son, who had been permitted to use his father's horse and wagon without restriction, took them in the absence and without the knowledge of his father on business of his own, left the horse unfastened in the street, and the horse ran away and injured the plaintiff's carriage. *Held*, that the father was not liable: *Maddox v. Brown*, 71 Me. 432; 36 Am. Rep. 336. The defendants ordered their teamster to deliver a wagon-load of paper to Taylor in Glastonbury, four miles distant, and to return by way of Nipsic with a load of wood. On reaching Taylor's the latter requested the teamster to carry the paper to Hartford, four and a half miles farther, and at the railway station there to get some freight of Taylor's and bring to him. The teamster consented, and while he was paying the freight-bill at the station, the team, being left unfastened, ran away and injured

plaintiff's property. *Held*, that defendants were not liable therefor: *Stone v. Hills*, 45 Conn. 44; 29 Am. Rep. 635. The plaintiff put his mare in the defendant's livery-stable for keeping, instructing a servant of the latter to exercise her, but this was not part of the contract of keeping. The mare died in consequence of immoderate riding by the servant. *Held*, that the defendant was not responsible: *Adams v. Cost*, 62 Md. 264; 50 Am. Rep. 211. A truck-driver in defendant's employment ran over a person while away from his proper course, having gone at the request of a third person, a friend of his own, to deliver a trunk unconnected with defendant's business. *Held*, that defendant was not liable: *Cavanagh v. Dinsmore*, 12 Hun, 465. A master of a ferry-boat left the wharf of the owners without the direction of their agent, who alone possessed authority to start the boat upon each trip, and took a burning barge in tow. After towing the barge some distance, he was obliged to cut it loose, and it drifted against a yacht and damaged it. *Held*, that the master of the ferry-boat was acting without the scope of his employment, and the owners of his boat were not liable for the injury to the yacht: *Ayrigg v. Railroad Co.*, 30 N. J. L. 460. Defendant's armed watchman, employed to guard his brewery, fatally shot C. as he was retreating from the brewery. *Held*, that he was not liable in damages for the servant's act, it not being in the line of his duty: *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257. A servant is directed to drive cattle out of a certain field, and he drives them elsewhere than out of the field, and one of them dies. The master is not liable: *Oxford v. Peter*, 28 Ill. 434.

§ 292. **Willful and Malicious Acts.**—It is held in a number of decided cases that where the servant acts willfully and maliciously in doing a wrong to another the master is not liable, even though he does the act in the pursuit of his master's business,¹ unless the master authorized the particular act or ratified it after it was com-

¹ *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479; 51 Am. Dec. 315; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507; *Fraser v. Freeman*, 43 N. Y. 566; 3 Am. Rep. 740; *Garvey v. Denig*, 30 How. Pr. 315; *Steele v. Smith*, 2 E. D. Smith, 321; *Purvey v. Thompson*, 5 Humph. 397; *Haltz v. Markel*, 44 Ill. 225; 92 Am. Dec. 182; *Pritchard v. Kefer*, 53 Ill. 117; *Tuller v. Voght*, 13 Ill. 277; *Johnson v. Barber*, 10 Ill. 425; *Oxford v. Peter*, 28 Ill. 434; *McCoy v. McKowen*, 26 Miss. 487; 50 Am. Dec. 264; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 481; *Cavanagh v. Dinsmore*, 12 Hun, 468; *Ware v. Canal Co.*, 15 La. 169; 35 Am. Dec. 189; *Cox v. Keahey*, 36 Ala. 340; 76 Am. Dec. 325; *Hagerstown Bank v. Adams Express Co.*, 45 Pa. St. 419; 84 Am. Dec. 499.

mitted.¹ This doctrine has been often criticised and condemned, both by text-writers and by courts;² and the later and better rule is, that a servant authorized to do an act is liable if he uses excessive force, though he does so willfully, and with malice towards the person injured;³ and the master is liable, although the servant had no orders as to the particular act, or proceeded in the matter contrary to orders.⁴ The principal must be held responsible where his employment afforded the agent the means or opportunity which he used while so employed in committing an injury on a third person; and the willful trespass or injury of the agent derived from the authority confided to him by the principal as a source of power in the exercise of his master's employment makes the principal responsible.⁵

ILLUSTRATIONS. — A trespasser on a locomotive was thrown off by the company's servants, while the train was running at a high rate of speed, and injured. *Held*, that the company was liable: *Carter v. R. R. Co.*, 98 Ind. 552; 49 Am. Rep. 780. A was the owner of certain premises which he leased to B. Subsequently A and his servant, C, attempted to enter upon the premises by force, and in the conflict which ensued, C shot B, who soon afterwards died of the wound. In a civil action by the representatives of B to recover, under the statute, damages for the wrongful killing of their intestate, the judge refused to

¹ *McManus v. Crickett*, 1 East, 106; *Lindsay v. Griffin*, 22 Ala. 629; *Brown v. Purviance*, 2 Har. & G. 316; *Moore v. Sanborn*, 2 Mich. 519; 59 Am. Dec. 209. In a Missouri case a master was held liable to his landlord for the wanton and reckless act of his clerk, which blew up and destroyed the store: *Mason v. Stiles*, 21 Mo. 374; 64 Am. Dec. 242.

² See Reeve on Domestic Relations, 640; Cooley on Torts, 535; 2 Thompson on Negligence, sec. 4, p. 886.

³ *Hewett v. Swift*, 3 Allen, 420; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83; *Seymour v. Greenwood*, 6 Hurl. & N. 359; *Croft v. Alison*, 4 Barn. & Ald. 590; *Howe v. Newmarch*, 12 Allen, 49; *Wolfe v. Mersereau*, 4 Duer, 473; *Hawes v. Knowles*, 114 Mass. 518; 19 Am. Rep. 383; *Sherley v. Billings*, 8 Bush, 147;

8 Am. Rep. 451; *Hawkins v. Riley*, 17 B. Mon. 101; *Duggins v. Watson*, 15 Ark. 118; 11 Am. Dec. 560; *Buckley v. Knapp*, 48 Mo. 152; *Metcalf v. Baker*, 2 Jones & S. 10; *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311; *Redding v. R. R. Co.*, 3 S. C. 1; 16 Am. Rep. 681; *Nashville etc. R. R. Co. v. Starnes*, 9 Heisk. 52; 24 Am. Rep. 297; *Korah v. Ottawa*, 32 Ill. 121; 83 Am. Dec. 255.

⁴ *Page v. Defries*, 7 Best & S. 137; *Leviness v. Post*, 6 Daly, 321; *Limpus v. Omnibus Co.*, 1 Hurl. & C. 526; *Southwick v. Estes*, 7 Cush. 385; *Garretzen v. Duenckel*, 50 Mo. 104; 11 Am. Rep. 405; *Powell v. Deveney*, 3 Cush. 300; 50 Am. Dec. 738; *Duggins v. Watson*, 15 Ark. 118; 60 Am. Dec. 560.

⁵ *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98.

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charge that, "if the jury believe that C fired the shot which caused B's death, with the premeditated design to effect his death, A is not liable for his act." *Held*, error: *Fraser v. Freeman*, 43 N. Y. 566; 3 Am. Rep. 740. Defendant's engine-man wantonly and maliciously sounded the locomotive whistle, so as to frighten the horses of plaintiff, whereby he was injured. *Held*, that defendant was liable: *Chicago etc. R. R. Co. v. Dickson*, 63 Ill. 151; 14 Am. Rep. 114. A servant of a railway company, employed to clean and secure the cars and keep persons out of them, kicked the hand of a boy eleven years old from a railing while the car was in motion, causing him to fall and be run over and killed. *Held*, that although the act itself was in nobody's line of duty, yet if done while the servant was in the discharge of his duty, the company was liable: *Northwestern R. R. Co. v. Hack*, 66 Ill. 238. A horse is intentionally fouled in a race, or purposely run against or interfered with by the rider of another horse. *Held*, that the employer of such rider is liable for the damages resulting: *McKay v. Irvine*, 11 Biss. 168. Defendant put a bag containing barley into his wagon under his shed. In two or three days thereafter his hired servant took the bag from the wagon, supposing it to contain oats, and carried it to a place where he was drawing logs for his master, to feed his horses with its contents. Finding his mistake, the servant fed some of the barley, and then put an iron bolt that he had been using as a clevice-pin into the bag, and carried the bag home and put it into the wagon where he found it with the barley and bolt in it, without informing his master of what he had done. Soon after the defendant, not knowing what his servant had done, nor that the bolt was in the bag, filled the bag with ears of corn, and carried the corn to plaintiff's mill to be ground, and in grinding, the bolt got into the corn-cracker and injured it. *Held*, that defendant was liable for the carelessness of his servant: *Tuel v. Weston*, 47 Vt. 634. A brakeman willfully dashed a jet of water upon a passenger, who had refused to pay the brakeman for watering the passenger's hogs. *Held*, that the company was liable: *Terre Haute and Indianapolis R. R. Co. v. Jackson*, 81 Ind. 19. A's servant, in charge of his horses and moving-machine, abandoned them to engage in a personal encounter with B. The noise of the fight frightened the horses, and they ran away, injuring the machine. *Held*, that the negligence of A's servant was the negligence of A, and he could not recover against B: *Page v. Hodge*, 63 N. H. 610.

§ 293. **Trespasses of Servant.**—So the master is liable for the trespasses of the servant,¹ but not if the trespass

¹ *Luttrell v. Hazen*, 3 Sneed, 20; *v. Piper*, 9 Barn. & C. 501; 4 Man. & Bath v. Caton, 37 Mich. 199; *Gregory R.* 500; *Mackay v. Commercial Bank*.

be criminal and felonious.¹ Thus the master has been held liable where he sends his servant to cut timber in his wood, without taking care to advise him as to its boundaries, and he thereby accidentally fells a tree on the land of another;² or where he directs his servant to pile rubbish in a certain place, and it accidentally slides down against his neighbor's wall;³ or where a servant, in order to move his master's barge to a dock, removes the plaintiff's therefrom, and so injures it.⁴ If a servant, in the ordinary course of his business, obstruct a highway, from which a traveler receives injury, the master is liable.⁵ Where a railroad company employs a detective to arrest and prosecute persons obstructing its track, and he arrests an innocent person, the company is responsible.⁶ The master is liable if the servant, while engaged in his master's service of pursuing a criminal, arrest illegally another man, supposing him to be the fugitive, though acting in disobedience of orders in further pursuit.⁷

ILLUSTRATIONS.—Laborers in the employ of a telephone company, in erecting the line, cut trees not on the right of way, in disobedience of the company's orders. *Held*, that the company was not liable: *Fairchild v. K. R. Co.*, 60 Miss. 931; 45 Am. Rep. 427. The plaintiff went to the defendant's store in New York City to purchase an ulster for herself. After she had examined one and put it on preparatory to its purchase, a floor-walker in the employ of the defendant approached and told her that she did not wish to purchase the ulster, but was a spy from a rival establishment, and told the saleswoman to take the cloak from the plaintiff, which was done. *Held*, that this constituted an actual assault, and that the defendants were liable for it: *Geraty v. Stern*, 30 Hun, 426. The defendant, owner of land adjoining the plaintiff's land, employed workmen to cut

of Brunswick, L. R. 5 P. C. 394; *Smith v. Webster*, 23 Mich. 298; *Potulni v. Saunders*, 37 Minn. 517; *contra*, *Bolingbroke v. Swindon Local Board*, L. R. 9 Com. P. 575.

¹ *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257.

² *Bath v. Caton*, 37 Mich. 199.

³ *Gregory v. Piper*, 9 Barn. & C. 591.

⁴ *Page v. Defries*, 7 Best & S. 137.

⁵ *Harlow v. Humiston*, 6 Cow. 189.

⁶ *Evansville etc. R. R. Co. v. McKee*, 99 Ind. 519; 50 Am. Rep. 102.

⁷ *Harris v. Louisville etc. R. R. Co.*, 35 Fed. Rep. 116.

trees on his own land, but omitted to employ competent persons to superintend the work, or properly to instruct them, so that they might distinguish his boundaries. *Held*, that defendant was liable for trees of the plaintiff which the workmen ignorantly cut down and removed: *Carmen v. Mayor etc. of New York*, 14 Abb. Pr. 301.

§ 294. Who are Servants within Previous Sections.—

The word "servant" in this connection is not restricted to domestic servants; it includes any person subject to the control of the party sought to be charged; the test briefly given being, Had he the right to control the person's conduct, and to discharge him from his employment for disobedience to his orders?¹ Another test is said to

¹ *Michael v. Stanton*, 3 Hun, 462; *Blackwell v. Wiswall*, 24 Barb. 355; *Pawlet v. R. R.*, 28 Vt. 297; *McGuire v. Grant*, 25 N. J. L. 357; 67 Am. Dec. 49; *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Quarman v. Burnett*, 6 Mees. & W. 509; *Wood v. Cobb*, 13 Allen, 58; *Kimball v. Cushman*, 103 Mass. 194; 4 Am. Rep. 528; *Corbin v. Am. Mills*, 27 Conn. 274; 71 Am. Dec. 63. In *Brackett v. Lubke*, 4 Allen, 138, 81 Am. Dec. 694, in holding the tenants of a house liable to damages for an injury to a pedestrian, caused by the negligence of a carpenter employed by him on the building, the court say: "The defendants are liable because it appears that the negligent act which caused the injury was done by a person who sustained towards them the relation of servant. There was no contract to do a certain specified job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed both the time and manner of doing it. If it was unsafe to make the repairs or alterations at an hour when the street was frequented by passers, it was competent for the defendants to require the person employed to desist from work until this danger ceased or was diminished. If the means adopted to gain access to

the awning were unsuitable, the defendants might have directed that another mode should be used. In short, if the work was in any respect conducted in a careless or negligent manner, the defendants had full power to change the manner of doing it, or to stop it, and to discharge the person employed from their service. The mere fact that the work was done by one who carried on a separate and independent employment does not absolve the defendants from liability. If such were the rule, a party would be exempt from responsibility even for the negligent acts of his domestic servants, such as his cook, coachman, or gardener. This point was distinctly adjudicated in *Sadler v. Henlock*, 4 El. & B. 570. The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated sum, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation

be, Was the employee working by the job, or at wages by the day, week, or month? If the latter, he is a "servant," and the master is responsible for his acts.¹ Where the hirer of a team with a driver agrees with the owner that he will temporarily furnish his own driver, the hirer is bound to ordinary care toward the owner, and the driver is his servant.² A lessor is not liable to a servant of the lessee for an injury resulting from the negligence of the latter, unless it arose from some unperformed duty remaining upon the lessor, even though the servant was originally the servant of the lessor, was ignorant of the lease, and supposed himself still in the lessor's employ.³ Whether a teamster through whose negligence in delivering coal one falls into a coal-hole and is injured is, in an action therefor, to be considered as the servant of the occupant of the building, depends on whether such occupant had the right to control the manner of delivery.⁴ One engaged in selling and delivering wood to the proprietor of a mill at so much per cord is not an employee of the proprietor so as to put him in the situation of one who takes the risk upon himself of negligence in those running the mill.⁵ A contractor for a job, by accepting and paying for work done thereon by a mechanic without his prior order or authority, does not render himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, not

or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it if he deems it necessary or expedient. This distinction is recognized in the cases adjudged by this court: *Sproul v. Hemmingway*, 14 Pick. 1; 25 Am. Dec. 350; *Stone v. Codman*, 15 Pick. 299; *Hilliard v. Richardson*, 3 Gray, 349; 63 Am. Dec. 743; *Linton v. Smith*, 8 Gray, 147."

¹ 2 Thompson on Negligence, 912; *Schular v. R. R. Co.*, 38 Barb. 653;

Brckett v. Lubke, 4 Allen, 138; 81 Am. Dec. 694. See *Moore v. Sanborne*, 2 Mich. 519; 59 Am. Dec. 209; *City of Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408. But it has been held in Connecticut that this test is not always decisive: *Corbin v. American Mills*, 27 Conn. 274; 71 Am. Dec. 63.

² *Hofer v. Hodge*, 52 Mich. 372; 50 Am. Rep. 256.

³ *Crusselle v. Pugh*, 67 Ga. 430; 44 Am. Rep. 724.

⁴ *Clapp v. Kemp*, 122 Mass. 481.

⁵ *Wadsworth v. Duke*, 50 Ga. 91.

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a part or result of the work itself, e. g., carelessly letting fall a brick.¹ The relation of master and servant does not exist between a contractor in a penitentiary and a convict; and the contractor is not liable to a third person for injuries resulting from the negligence of the convict in the course of his employment.² A fireman in the city in which he lives has no such relation to it as a servant as to prevent his maintaining an action to recover special damages occasioned by defects in a highway in such city,³ nor has a police officer.⁴ The inmates of a county hospital are not servants of the superintendent, and he is not responsible for their acts.⁵ A gas company is not responsible for injuries sustained in consequence of the carelessness, in letting on gas, of a person who, though formerly an agent of the company, is no longer such, but is permitted by the company to let on gas when a consumer requests it.⁶ A party who avails himself of the use, temporarily, of the services of a servant regularly employed by another person may be liable, as master, for the acts of such servant during the temporary service.⁷ Whether the relation of master and servant or principal and agent exists between defendants jointly prosecuted for a tort, is a question of fact for the jury.⁸

ILLUSTRATIONS.—G. and S. occasionally exchanged labor with their teams. On one occasion G. sent a driver with a team to draw some material for S. *Held*, that while so employed the driver was the servant of G., and S. was not liable for the negligence of such driver: *Michael v. Stanton*, 5 Thomp. & C. 634; 3 Hun, 462. A storekeeper, having sold merchandise, permitted or directed the purchaser's servant to remove it by throwing it from an upper window into the street. The servant did this carelessly, and injured the plaintiff. *Held*, that

¹ *Coomes v. Houghton*, 102 Mass. 211.

⁴ *Kimball v. Boston*, 1 Allen, 417.

² *Cunningham v. Bay State Shoe and Leather Co.*, 25 Hun, 210; *Hartwig v. Bay State Shoe and Leather Co.*, 43 Hun, 425.

⁵ *Schrubbe v. Connell*, 69 Wis. 476.

³ *Cunningham v. Bay State Shoe and Leather Co.*, 25 Hun, 210; *Hartwig v. Bay State Shoe and Leather Co.*, 43 Hun, 425.

⁶ *Flint v. Gloucester Gaslight Co.*, 9 Allen, 552.

⁷ *Palmer v. Portsmouth*, 43 N. H. 265.

⁷ *Wood v. Cobb*, 13 Allen, 58.

⁸ *Banfield v. Whipple*, 10 Allen, 27; 87 Am. Dec. 618.

the storekeeper was not liable: *McCullough v. Shoneman*, 105 Pa. St. 169; 51 Am. Rep. 194. The owners of a foundry for years had given the ashes to their engineer in consideration of his removing them after working hours. The engineer deposited them, to the knowledge of his employers, on an uninclosed lot opposite the foundry, owned by third persons, whose permission he had obtained, and sold the ashes to third persons, and to the defendants. A young child, running across that lot, fell into a quantity of the hot ashes, and was burned. *Held*, that the owners of the foundry were not liable therefor: *Burke v. Shaw*, 59 Miss. 443; 42 Am. Rep. 370. A and B were partners. A owned individually a horse and carriage, which he sent with his own servant to the station to meet B and bring him to the store. While going to the store with B, the servant recklessly ran against C and injured him. *Held*, that the servant was not the servant of B, and that B was not liable: *Muse v. Stern*, 82 Va. 33; 3 Am. St. Rep. 77. In an action against A for the negligence of B, it having been shown that A was working under a contract to haul sand at so much a load from B's lot, *held*, that to determine whether the relation of master and servant existed between A and B, a witness might be asked by whose orders A quit drawing sand from another lot of B, and whether B could have directed A to stop hauling from the lot in question: *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61. Defendant was the owner of a certain building, and after it was burned he allowed certain persons to enter on the premises for the purpose of removing the debris, which they did so unskillfully that they knocked down the walls of the house onto plaintiff's premises. *Held*, to show the relation of master and servant, making defendant liable: *Dillon v. Hunt*, 82 Mo. 150. V. was a passenger on a street-car, drawn by horse-power, and on its arrival at a point of intersection with a steam railroad, the crossing was occupied by a train of cars belonging to the latter company, and the horse-car stopped to wait the passage of the train. After the train had crossed the street, the flagman of the steam railroad company signaled the driver of the car to go forward, and he did so, and at the same time the train backed and struck the car before it had quite crossed the track, injuring V. *Held*, in an action against the horse-railroad company, that the fact that the driver of the horse-car had been directed by his superior to obey the signals of the flagman, and did so obey them, did not convert the flagman into an agent of the horse-railroad company: *Chicago etc. R. R. Co. v. Volk*, 45 Ill. 175. A bought a heavy article of B, at his store, and sent a porter to get it, and the porter, by permission of B, using his tackle and fall, through negligence suffered the article

to fall, by which C was injured. *Held*, that the porter acted as the servant of A, and that B was not answerable: *Stevens v. Armstrong*, 6 N. Y. 435. A contractor, engaged in repairing a bridge upon a railroad for the company, employs men to work thereon by the day. *Held*, that the latter are the servants of the contractor, and not of the company; and between them and the company there is no privity whatever: *Young v. Railroad Co.*, 30 Barb. 229. A public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver at the store of the employer at so much per barrel, and while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk. *Held*, that the employer was not liable for the injury: *De Forrest v. Wright*, 2 Mich. 368. A railroad company undertook to remove a cargo of coal from a vessel to its freight-cars, and having had some difficulty with the gang of shovelers, who were on a strike, made an arrangement with its weigh-master to allow him a certain sum per ton for shoveling and dumping the coal, and that he should employ the shovelers, and if he could employ them for less than the sum allowed him, the difference should be his perquisite, independent of his regular wages as weigh-master. The weigh-master then hired a gang of shovelers, made his returns weekly to the company of the number of tons shoveled, received the amount allowed him, and paid the shovelers. The regular payrolls of the employees of the company, including the weigh-master, did not embrace the shovelers. *Held*, that the shovelers were not the servants of the company: *Burke v. Railroad Co.*, 34 Conn. 474.

§ 295. Master not Liable for Acts of Independent Contractor.—Where a person contracts with another exercising an independent employment to do a work for him, according to the contractor's own methods, and not subject to his control or orders except as to the results to be obtained, the former is not liable for the wrongful acts of such contractor or his servants.¹ So a contractor is not

¹ *Hilliard v. Richardson*, 3 Gray, 349; 63 Am. Dec. 743; *Harkins v. Standard Sugar Co.*, 122 Mass. 400; *Forsyth v. Hooper*, 11 Allen, 419; *Lorton v. Smith*, 8 Gray, 147; *Coomes v. Houghton*, 102 Mass. 211; *Morgan v. Bowman*, 22 Mo. 538; *Clark v. Hannibal R. R. Co.*, 36 Mo. 202; *Barry v. St. Louis*, 17 Mo. 121; *Boswell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345; *Fanjoy v. Seales*, 29 Cal. 243; *Du Pratt v. Lick*, 38 Cal. 631; *Schuler v. Hudson R. R. Co.*, 38 Barb. 653; *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78; *Darmstaetter v.*

liable for the wrongs of an independent subcontractor;¹ nor the subcontractor for the acts of his subcontractor, and so on.² If a person hires a wagon or carriage, horses and driver, to another, the former is alone liable for the negligence of the driver which injures a third person,³ or which damages the vehicle.⁴ One who contracts with a furnace company to dig sand on its land and draw it to its furnace at a fixed price per load, there being no provisions as to the manner of the performance of the work, is not a servant for whose negligence the company is liable.⁵ The lessee of land is not the servant of his les-

Moynahan, 27 Mich. 188; Allen v. Willard, 57 Pa. St. 374; Erie v. Caulkins, 85 Pa. St. 247; Paulet v. Rutland R. R. Co., 28 Vt. 207; Robinson v. Webb, 11 Bush, 464; Kellogg v. Payne, 21 Iowa, 575; Callahan v. Burlington etc. R. R. Co., 23 Iowa, 562; Wood v. School District, 44 Iowa, 27; Kansas etc. R. R. Co. v. Fitzsimmons, 18 Kan. 34; Schewickhardt v. St. Louis, 2 Mo. App. 571; Harrison v. Collins, 86 Pa. St. 153; 27 Am. Rep. 699; Cincinnati v. Stone, 5 Ohio St. 38; Clark v. Fry, 8 Ohio St. 358; 72 Am. Dec. 590; Kepperly v. Ramsden, 83 Ill. 354; Scammon v. Chicago, 25 Ill. 424; 79 Am. Dec. 334; West v. St. Louis etc. R. R. Co., 63 Ill. 545; Prairie State Co. v. Dorg, 70 Ill. 52; Hale v. Johnson, 80 Ill. 185; Connors v. Hennessey, 112 Mass. 96; Wright v. Holbrook, 52 N. H. 120; 13 Am. Rep. 12; Pack v. New York, 8 N. Y. 222; Painter v. Pittsburgh, 46 Pa. St. 213; Hunt v. Pennsylvania R. R. Co., 51 Pa. St. 475; Reed v. Allegheny City, 79 Pa. St. 300; Wray v. Evans, 80 Pa. St. 102; Ryder v. Thomas, 13 Hun, 296; Clark v. Vermont etc. R. R. Co., 28 Vt. 103; Van Wert v. Brooklyn, 28 How. Pr. 451; Benedict v. Martin, 36 Barb. 288; Barrett v. Singer Mfg. Co., 1 Sweeny, 545; McCafferty v. Spuyten Duyvil etc. R. R. Co., 61 N. Y. 178; 19 Am. Rep. 267; O'Rourke v. Hart, 7 Bosw. 511; 9 Bosw. 301; Potter v. Seymour, 4 Bosw. 140; Kelly v. New York, 11 N. Y. 432; 4 E. D. Smith, 291; Gent v. New York, Sold. Notes, 240; Gardner v. Bennett, 6 Jones & S. 197;

King v. New York etc. R. R. Co., 66 N. Y. 182; 23 Am. Rep. 37; Pierpont v. Loveless, 72 N. Y. 211; Linton v. Smith, 8 Gray, 147; Eaton v. Railroad Co., 59 Mo. 520; 8 Am. Rep. 430; Cuff v. Railroad Co., 35 N. J. L. 17; 10 Am. Rep. 205; McGuire v. Grant, 25 N. J. L. 356; 67 Am. Dec. 50; Mulcahy v. Dook Co., 8 Daly, 93; Lancaster etc. Improvement Co. v. Rhoads, 116 Pa. St. 377; 2 Am. St. Rep. 608; Mayor v. McCarty, 84 Ala. 469; Brown v. McLeash, 71 Iowa, 381. "If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee": Bigelow, C. J., in Brackett v. Lubke, 4 Allen, 138; 81 Am. Dec. 694. But see Stone v. Cheshire R. R. Co., 19 N. H. 427; 51 Am. Dec. 192.

¹ Cuff v. Newark Co., 35 N. J. L. 17; 10 Am. Rep. 205; Slater v. Mesercoan, 64 N. Y. 138; 5 Daly, 445; Holt v. Whatley, 51 Ala. 569.

² Knight v. Fox, 5 Ex. 721.

³ Quarman v. Barnett, 6 Mees. & W. 499; Crockett v. Calvert, 8 Ind. 127.

⁴ Ames v. Jordan, 71 Me. 540; 36 Am. Rep. 352.

⁵ Fink v. Furnace Co., 82 Mo. 276; 52 Am. Rep. 376.

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sor;¹ nor the vendee in possession the servant of the vendor;² so, also, the receiver of a corporation is not its servant within this rule.³ So as between the owner and charterer of a vessel, the owner is liable for the acts of the crew if he provides them and controls them;⁴ the charterer is liable if the whole matter is given into his control for a certain term.⁵ A ship-owner is not liable for an injury to his employee by the negligence of a stevedore in loading the vessel.⁶ A licensed pilot voluntarily employed by the owner of a vessel is his servant, for whose acts he is responsible.⁷ And where it is compulsory by law for the master to take a particular pilot, his acts are not the acts of the owner or of the master.⁸

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ILLUSTRATIONS.—MASTER HELD NOT LIABLE.—The plaintiff was injured by the negligent driving of the defendant's team by the defendant's driver, both team and driver being hired by a third person, who had requested the services of that particular driver. *Held*, that the defendant was not liable: *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516; 45 Am. Rep. 54. The defendant contracted to have T. cut timber from defendant's land at a specified price per foot, and deliver it at the mouth of a certain river, using the defendant's dams in the driving of the logs, if he chose. T. used the defendant's dam in the business in an unreasonable manner, to the plaintiff's injury, but the defendant had nothing to do with the cutting, hauling, or driving of the logs. *Held*, that the defendant was not liable: *Carter v. Berlin Mills*, 58 N. H. 52; 42 Am. Rep. 572. The defendant, owning a saw-mill, employed master machinists to repair the water-wheel, and the machinists sent the plaintiff with others to do the work. It was understood between the workmen and

¹ Fiske v. Manufacturing Co., 14 Pick. 491; Blackwell v. Wiswall, 24 Barb. 355; 14 How. Pr. 257; Norton v. Wiswall, 26 Barb. 618; 14 How. Pr. 42.

² Earle v. Hall, 2 Met. 353.

³ Ohio etc. R. R. Co. v. Davis, 23 Ind. 553; 85 Am. Dec. 477.

⁴ Annett v. Foster, 1 Daly, 502; Fenton v. Dublin Steam Packet Co., 1 Perry & D. 103; 8 Ad. & E. 835; Dallyell v. Tyrer, El. B. & E. 906.

⁵ Abbott on Shipping, sec. 55; Korah v. Ottawa, 32 Ill. 121; 83 Am. Dec. 255.

⁶ Rankin v. Trans. Co., 73 Ga. 229; 54 Am. Rep. 874.

⁷ Yates v. Brown, 8 Pick. 23; Shaw v. Reed, 9 Watts & S. 72; Bussy v. Donaldson, 4 Dall. 206; The Killarney, 1 Lush. 427; Neptune the Second, 1 Dod. 467.

⁸ Snell v. Rich, 1 Johns. 305; Bennet v. Moita, 7 Taunt. 258; The Annapolis, 1 Lush. 295; The Maria, 1 Wm. Rob. 106; General Steam Navigation Co. v. British Navigation Co., L. R. 3 Ex. 330.

the defendant that the mill should be run when they were not working on the wheel. While they were so at work, the defendant's engineer negligently started the wheel, injuring the plaintiff. *Held*, that defendant was not liable: *Ewan v. Lippincott*, 47 N. J. L. 192; 54 Am. Rep. 148. When the plaintiff was driving on a highway, his horse became frightened at a steam-shovel in use on the defendant's lands near the road, and ran away, and the plaintiff was hurt. The shovel was operated and controlled by an independent contractor, although the defendant contemplated its use when the contract was made. *Held*, that the defendant was not liable: *Bailey v. Railroad Co.*, 57 Vt. 252; 52 Am. Rep. 129. An owner of land contracts with a person to clear it. In doing so the contractor starts a fire, which communicates to adjoining land. *Held*, that the employer is not responsible: *Ferguson v. Hubbell*, 97 N. Y. 507; 49 Am. Rep. 544. A ship was chartered to the commissioners of the royal navy as an armed vessel, and navigated by a master and sailors provided by the owner. *Held*, that he was liable for damage done to another vessel by the misconduct of such crew, although a commander of the royal navy and a king's pilot were on board: *Fletcher v. Braddick*, 2 Bos. & P. N. R. 182. The plaintiff was injured by the carelessness of men occupied in repairing the roof of defendant's building. The men were employees, and under the orders of one who carried on the business of slating roofs, and who was engaged by the defendant to do the job in question. *Held*, that the elater carried on an independent employment, and the defendant was not liable: *McCarthy v. Second Parish of Portland*, 71 Me. 318; 36 Am. Rep. 320. One of the defendants, a painter, contracted to paint the interior of a dome, and having no knowledge of building scaffolds, contracted with the other defendant, an experienced scaffold-builder, to erect a first-rate scaffold therefor. The builder defectively constructed the scaffold, and it gave way and caused the death of the plaintiff's intestate, who was at work upon it in the master painter's employ. It did not appear that the master knew or had reason to know of the defect. *Held*, that the master was not liable, but that the builder was: *Devlin v. Smith*, 89 N. Y. 470; 42 Am. Rep. 311. A being notified by the authorities of the city to take down his house, or to make it safe, thereupon entered into a verbal contract with B, whereby B agreed "to take the building down." In doing so, B negligently weakened a party-wall, and caused the house of C to fall. *Held*, that A was not liable to C: *Earl v. Beadleston*, 10 Jones & S. 294. A town contracted with a person to clear off a strip of land surrounding a pond, which it had purchased for the purpose of supplying its inhabitants with water. In so

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doing he negligently set fire to the timber and fences of an adjacent owner. *Held*, that the town was not liable: *Wright v. Holbrook*, 52 N. H. 120; 13 Am. Rep. 12. A well-borer contracted with a school district to bore a well in the school-house yard. He left his machine unguarded, whereby one of the school children was injured. *Held*, that the school district was not liable: *Wood v. Independent School District*, 44 Iowa, 27. A enters into a contract to protect B's farm from fire, and, in carrying it out, sets fire to the field of C. *Held*, that A, and not B, must pay damages to C: *Kellogg v. Payne*, 21 Iowa, 575. A, the proprietor of a pinery, contracted with B that B should cut all the logs A had on certain land, and deliver them to A at a place named, A to have no part in the running of the logs until they reached the place named, and not to render B any assistance in the prosecution of the work, pecuniary or otherwise. *Held*, that B was not the servant of A, and A was not liable for B's negligence in obstructing the navigation: *Moore v. Sanborne*, 2 Mich. 519; 59 Am. Dec. 209. A employed B to construct a drain in a public highway; B employed C to fill in the earth over the brick-work, and to carry away the surplus. C, in performing his work, left the earth raised so much above the level of the road that D, driving in the dark, was thereby upset and injured. A was held not responsible for the negligence of C: *Peachey v. Rowland*, 13 Com. B. 182. D. and M. had an absolute contract with a railroad company to draw their cars, furnishing the horses and drivers, and assuming the entire control. *Held*, that the company was not liable for injury arising from the negligence of D. and M.'s employees in this work: *Schular v. Railroad Co.*, 38 Barb. 653. The defendant, who was an undertaker, was employed by a third person to superintend a funeral, it being arranged that he should furnish carriages for various persons, among whom was the plaintiff, who were to attend the funeral. While returning from the funeral, the driver of the plaintiff's carriage stopped at and entered a hotel, leaving his horses, which ran away and injured the plaintiff. There was evidence that the driver had entered the hotel at the invitation of defendant. The carriage and horses were owned by the driver. *Held*, that the defendant was not liable for the injury: *Boniface v. Relyea*, 6 Robt. 397; 5 Abb. Pr., N. S., 259. The owner of a building employed a plumber to repair the water-pipes in his own way. *Held*, not liable for an injury produced to a third person by his negligence in that work: *Bennett v. Truebody*, 66 Cal. 509; 56 Am. Rep. 117. A was employed to paint a church, and he gave to B a contract for frescoing. A lent B two competent men, who were sent up to place the planks, etc. A painter employed by B sustained

injury from the breaking of one of these planks. The planks were furnished by the church. The painter who was injured sued A on the ground that the men sent to do B's work should have detected the imperfection in the plank. *Held*, that the action could not be maintained: *Ditberner v. Rogers*, 66 How. Pr. 35; 13 Abb. N. C. 436. Plaintiff was injured by a falling fence built by a contractor whom defendant had employed to construct a vault for a new building to be erected. *Held*, that defendant was not liable: *Martin v. Tribune Ass'n*, 30 Hun, 391. B agreed, for a specified sum, to dig a ditch and lay a pipe for A, A to furnish pipe and boxing, but to have no further connection with the work. *Held*, that B was an independent contractor, for whose negligence in leaving the ditch unprotected, whereby C sustained injury, A was not responsible: *Smith v. Simmons*, 103 Pa. St. 32; 49 Am. Rep. 113. A was employed to paint a building, and not being able himself to build a scaffold, employed a skillful and competent person to build it. It broke, and one of A's workmen was injured. *Held*, that A was not liable: *Devlin v. Smith*, 25 Hun, 206. A canal-boat came to the dock of A, who was bound to unload her. He employed shovelers, who, at the request of the captain of the boat, and for the convenience of all, moved a scow, to her injury. *Held*, that A was not liable: *Morrell v. Rheinfrank*, 24 Fed. Rep. 94. A railway company contracted with certain parties to construct its road and its appurtenances. The contractors hired the plaintiff to work upon a freight-house they were building for the company. A poisonous mixture, in which corrosive sublimate was an ingredient, was applied to the timber to prevent decay. The plaintiff was injured by breathing the exhalations of this substance, and by handling the timber to which it had been applied. *Held*, that the railway company was not liable to the plaintiff for the injury he received, but that the contractors were solely responsible, and were not in this respect the servants of the company: *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545. A railway company employs a contractor to build its road, and agrees to furnish the motive power and operate the construction trains, the contractor to handle all material, and build a certain number of miles per month. *Held*, that the company's engineer on a construction train is not under the control of the company, but under that of the contractor, and the company is not liable for injuries caused by negligence of the engineer in too rapidly operating the train: *Miller v. Minnesota etc. R'y Co.*, Iowa, 1888.

ILLUSTRATIONS CONTINUED. — MASTER HELD LIABLE. — The defendant's horse kicked a loose shoe through the plaintiff's

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window-glass. The horse was being driven by a person paid by the defendant, and by the latter let with a wagon by the day to a city in the work of paving streets. It was under the sole management of that person, whose duty it was to keep it properly shod. *Held*, that the driver was at the time the servant of the defendant, and the defendant was liable for the injury: *Huff v. Ford*, 126 Mass. 24; 30 Am. Rep. 645. A railroad company let certain work to a contractor, furnishing him a construction train, with an engineer to run it. Except in respect to speed and side-tracking for other trains, the train was under the control of the contractor. The company was bound to discharge the engineer on the contractor's complaint; otherwise, the company controlled him; and it paid his wages, but deducted them from the amount due the contractor. *Held*, that the engineer was the servant of the company: *New Orleans etc. R. R. Co. v. Norwood*, 62 Miss. 565; 52 Am. Rep. 191. The owner of cars used by the railroad company agreed to clean them. His employee, while crossing the track in the discharge of his duty, was injured by a car negligently and suddenly set in motion by employees of the railroad company. *Held*, that the employee had a right of action against the railroad company: *Harold v. New York Central etc. R. R. Co.*, 13 Daly, 89; *Young v. New York Central etc. R. R. Co.*, 13 Daly, 294. A railroad furnished platform cars to shippers of lumber, allowing shippers to furnish stakes or standards to set in the iron sockets and support the lumber. A stake so furnished broke, precipitating a brakeman, on the lumber, to the ground. *Held*, that the brakeman had an action against the railroad: *Bushby v. New York, Lake Erie etc. R. R. Co.*, 107 N. Y. 374. An employee of a railroad permitted an incompetent engineer to take charge of a train, and an accident ensued. *Held*, that the company was liable to a passenger injured: *Lakin v. R. R. Co.*, 15 Or. 220.

§ 296. Exceptions — Where Work is a Nuisance or Dangerous per Se.—An exception to this rule exists where the work is wrongful *per se*, and must result in a nuisance. Here the original employer will be liable for any injury done to third persons, although the work is employed by an independent contractor, employing his own servants.' If one employs a contractor to enter upon

¹ *Ellis v. Sheffield Gas Co.*, 2 El. & B. 766; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; 59 Am. Dec. 476; *Lockwood v. New York*, 2 Hilt. 66; *Water Co. v. Ware*, 16 Wall. 566; *Chicago v. Robbins*, 2 Black, 418; *Cuff v. New-ark R. R. Co.*, 35 N. J. L. 17; 10 Am. Rep. 205; *Kellogg v. Payne*, 21 Iowa, 578; *Hundhausen v. Bond*, 36 Wis. 29; *Clark v. Fry*, 8 Ohio St. 358;

land and do certain work, and it turns out that the entry is a trespass, the employer is liable for a trespass thus committed by a subcontractor.¹ One who employs another to fill his ice-house by the cord, and obtains license from the municipal authorities to encumber the street for that purpose, cannot shield himself from liability for injuries caused by unlawfully obstructing the street with blocks and fragments of the ice, under an objection that his employee was a contractor and alone liable.² So, too, where the work is *per se* dangerous to others, the proprietor is required to foresee such dangers and provide against them.³ So, where the injury is caused by defective construction which was inherent in the original plan of the employer.⁴ He cannot relieve himself from liability to third persons by any contract he may make with the contractor.⁵

ILLUSTRATIONS. — A, a proprietor, employed B, a contractor, to tear down and rebuild his house, committing the entire work to B, who assumed the risk of supporting the adjacent house of C, which was entitled to support from the house of A. The house of C was injured, through the negligence of B in failing properly to support it. A was held answerable in damages to C: *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Brown v. Werner*, 40 Md. 15. Defendant employed B, who was engaged in "the roofing and cornice business," to repair the cornice of his hotel, in the city of New York. No price or plan was specified; and the mode of repair and the means to be employed were left entirely to the judgment of B. The employees of B suspended a ladder from the roof, upon which planks were placed to serve as a scaffold. A heavy wind caused one of the planks to fall,

72 Am. Dec. 590; *Carman v. Steubenville*, 4 Ohio St. 399; *Treadwell v. New York*, 1 Daly, 128; *Creed v. Hartmann*, 29 N. Y. 591; 86 Am. Dec. 341; *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 33; *Deford v. State*, 30 Md. 179; *City of Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408. One who employs a contractor to do an unlawful act is responsible for any damage arising from the negligent manner in which the work is performed: *Congreve v. Morgan*, 5 Duer, 495.

¹ *Leber v. Minneapolis and Northwestern R'y Co.*, 29 Minn. 256.

² *Darmstaetter v. Moynahan*, 27 Mich. 188.

³ *Robbins v. Chicago*, 4 Wall. 657; *Chicago v. Robbins*, 2 Black, 418.

⁴ *Boswell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345; *Lancaster v. Conn. Mut. Ins. Co.*, 92 Mo. 460; 1 Am. St. Rep. 739.

⁵ *Ellis v. Gas Co.*, 2 El. & B. 770; *Carman v. Steubenville*, 4 Ohio St. 399.

and it struck and injured the plaintiff, who was passing. Defendant was not in the city during the repairs, and had no knowledge of the manner in which they were being done. The building was separated from the sidewalk by an area fifteen feet wide. *Held*, that the scaffold was not a nuisance, and the defendant was not liable: *Hexamer v. Webb*, 101 N. Y. 377; 54 Am. Rep. 703.

§ 297. **Where Duty is Imposed by Contract.**—So, also, where a person contracts to do a certain thing, he cannot evade liability by giving over to another the work he has agreed to perform.¹ Thus where a mining company contracts for the removal of ore, but assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employees for injury in consequence of neglect of that duty.²

ILLUSTRATIONS.—A company undertook to lay water-works in a city, agreeing with the municipality that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employees in the premises." The company let out the work to a contractor, who used a steam-drill in such a manner as to frighten a traveler's horse and injure the traveler. *Held*, that the company was liable to the traveler: *Water Co. v. Ware*, 16 Wall. 566. O. contracted to put a cornice on defendant's mill, defendant agreeing to erect the scaffolding necessary for the purpose, free of cost to O. Defendant erected the scaffolding so negligently that it fell, killing plaintiff's intestate, a servant of O., who was at work upon it. *Held*, that defendant was liable: *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; 15 Am. Rep. 387. A contracted with the owners of a mine to excavate the ore, they agreeing to erect such supports and props as would render the miners safe whenever notified by the contractor that the same were necessary. *Held*, that even in the absence of such notice the owners were liable to a miner for injury caused by the lack of proper supports, if, having actual knowledge of the necessity, they failed to erect them: *Kelly v. Howell*, 41 Ohio St. 438.

¹ *Langridge v. Levy*, 2 Mees. & W. 519; 4 Id. 337; *Sulzbacher v. Dickie*, 6 Daly, 469; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Mulchey v. Meth-*

odist Soc., 6 Rep. 751; *Campbell v. Somerville*, 114 Mass. 334.

² *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; 33 Am. Rep. 423.

§ 298. **Where Duty is Imposed by Law.**—And where a duty is imposed upon a person by a statute, he is liable for any injury in performing it, whether by himself or by a contractor employed by him.¹ Where a municipal ordinance requires the owner of materials forming an obstruction in a street to prepare and place lights thereon, with such care and diligence as reasonably to secure their burning till daylight, such owner is liable to third per-

¹ *Gray v. Pullen*, 5 West & S. 970. But see *Eaton v. Railroad Co.*, 59 Me. 529; 8 Am. Rep. 430. *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24, 34 Am. Dec. 33, is an instructive case in this connection. See statement by Thomas, J., in *Hilliard v. Richardson*, 3 Gray, 349: "In a previous suit the town of Lowell (*Currier v. Lowell*, 16 Pick. 170) had been compelled to pay damages sustained by Currier by reason of a defect in one of the highways of the town. The defect was caused in the construction of the railroad of the Boston and Lowell company. It consisted in a deep cut through the highway made in the construction of the railroad. Barriers had been placed across the highway to prevent travelers from falling into the chasm. It became, in the construction of the railroad, necessary to remove the barriers, for the purpose of carrying out stone and rubbish from the deep cut. They were removed by persons in the employ of the corporation, who neglected to replace them. Currier and another person, driving along the highway in the night-time, were precipitated into the deep cut and seriously injured. Currier brought his action against the town of Lowell, and recovered damages. This action was to recover of the railroad corporation the amount the town had been so compelled to pay. The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defense was not sus-

tained, nor should it have been. The defendants had been authorized by their charter to construct a railroad from Boston to Lowell, four rods wide through the whole length. They were authorized to cross turnpikes or other highways, with power to raise or lower such turnpikes or highways so that the railroad, if necessary, might pass conveniently over or under the same. Now, it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and that they are bound, in the construction of them, to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad, and under authority of the corporation vested in them by law for the purpose. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; and that servant had the care and supervision of them. The accident occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell v. Boston and Lowell R. R.* stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say that the fact of Noonan being a contractor for this section did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders."

sons for injuries incurred through negligence in the performance of this duty, either by himself or by a contractor in his employ, and even if the lights were extinguished by an unknown cause.¹

ILLUSTRATIONS.—A railroad company was empowered by act of Parliament to construct a bridge across a navigable river. The act provided that it should not be lawful to detain any vessel navigating the river, for a longer time than sufficient to enable any carriages, animals, or passengers ready to traverse, to cross the bridge, and to open it to admit such vessel. The company employed a contractor to construct the bridge, in conformity with the act; but before the works were completed, the bridge, from some defect in its construction, could not be opened, and the vessel of A was prevented from navigating the river. *Held*, that the company was liable to A: *Hole v. Sittingbourne R. R. Co.*, 6 Hurl. & N. 488. A, by statute, was empowered to make a drain from his premises to a sewer, by cutting a trench across the highway. The statute provided, in careful terms, that where the surface of a highway should be thus broken, the person so breaking it should restore it to its former condition, or be subject to a penalty for failing so to do. A employed to do this work a contractor, by whose negligence the drain was filled improperly, in consequence of which damages ensued to B. *Held*, that A was liable to B: *Grey v. Pullen*, 5 Best & S. 970; *City of Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78.

§ 299. **Where Employer Interferes with or Directs Work.**—The proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference.² But merely taking steps to see that the

¹ *Wilson v. White*, 71 Ga. 506; 51 Am. Rep. 269.

² 2 Thompson on Negligence, p. 913, sec. 40; *Gilbert v. Beach*, 4 Duer, 423; 5 Bosw. 445; 16 N. Y. 608; *Jones v. Chantry*, 4 Thomp. & C. 63; *Griffiths v. Wolfram*, 22 Minn. 185; *Burton v. Railroad Co.*, 61 Tex. 526; *Brackett v.*

Lubke, 4 Allen, 138; 81 Am. Dec. 694; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256. If an owner modifies in any respect his contract with those contracting to erect a building, so that in doing any particular act they are obeying the directions of the owner, if that act is negligent, and

contractor carries out his agreement, as, having the work supervised by an architect or superintendent, does not make the employer liable;¹ nor does reserving the right to dismiss incompetent workmen.²

ILLUSTRATIONS. — A contractor agreed with trustees of an estate to take down a building for them carefully, and under their direction, and subject to their approval. *Held*, that the trustees were liable for injury to a third person by the contractor's negligence in the work: *Linnehan v. Rollins*, 137 Mass. 123; 50 Am. Rep. 287. A contract stipulated: "The work to be done under the direction of the city civil engineer, or agent appointed by the city council for the same, who shall have entire control over the manner of doing and shaping all or any part of the same, and whose directions must be strictly obeyed." *Held*, that the city was liable for the negligence of the contractor in depositing a pile of stones so as to obstruct the flow of surface water and flood the premises of an adjacent owner: *Cincinnati v. Stone*, 5 Ohio St. 38. The charter of a city gave the street commissioners authority to "direct and control the persons employed" on the streets, and it was stipulated in the contract that the work was to be done "under the direction of the street commissioners." *Held*, that the city was responsible for an injury to a traveler by the negligence of the contractor: *St. Paul v. Seitz*, 3 Minn. 297. Defendant, a railroad corporation, made a contract with A, whereby he was to have entire charge, in defendant's freight-car yard, of the work of making up freight trains, etc., and to be paid a certain sum per ton of freight and for each car hauled from the yard. Defendant's superintendent was authorized to see that the work was done satisfactorily, and if it were not, defendant could terminate the contract at twenty-four hours' notice. The men employed in the yard were paid by A. B sued defendant for injuries received through the negligence of train-men in the employ of A.

damage ensues, the owner is liable. In such a case, it is his duty to see that what is done under his special orders is not negligently done: *Hefferman v. Benkard*, 1 Robt. 436. The owner of a mine who furnishes the operating machinery and engages another person to open the mine sustains the relation of master to an employee of the person so engaged: *Fell v. Rich Hill Coal Mining Co.*, 23 Mo. App. 216.

¹ *Clark v. Hannibal R. R. Co.*, 36 Mo. 202; *Callahan v. Railroad Co.*, 23

Iowa, 562; *City of Erie v. Caulkins*, 85 Pa. St. 247; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Robinson v. Webb*, 11 Bush, 464; *Pacific v. New York*, 8 N. Y. 222; *Hunt v. Railroad Co.*, 51 Pa. St. 475; *Samuelson v. Cleveland Mining Co.*, 49 Mich. 164, 43 Am. Rep. 456; *contra*, *Schwartz v. Gilmore*, 45 Ill. 455; 92 Am. Dec. 227; *Camp v. Churchwardens*, 7 La. Ann. 321; *Harper v. Milwaukee*, 30 Wis. 365.

² *Reedie v. Railroad Co.*, 4 Ex. 244; *Schular v. Railroad Co.*, 38 Barb. 653.

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Held, that A was the servant of defendant, and not an independent contractor: *Speed v. Railroad Co.*, 71 Mo. 303. The contract between a railroad company and a contractor for building its road stipulated that if at any time the contractor failed to employ men, tools, implements, and machinery in kind and quality to the satisfaction of the chief engineer of the company, the company, after written notice to the contractor, should have the right to annul the contract. *Held*, that this did not show such a right of selection of the contractor's servants as to make the company responsible for an injury sustained from the fall of a chain used by a servant of the contractor: *Burmeister v. New York Elevated R. R. Co.*, 47 N. Y. Sup. Ct. 264.

§ 300. **Other Cases where Employer is Liable.**—Other circumstances may render the proprietor liable, as, for instance, knowingly selecting an incompetent contractor.¹ Judge Thompson says:² "Notwithstanding the injury may have happened while the work was being prosecuted by an independent contractor, yet the proprietor will be liable if it is traceable to his previous negligence,—as, if a building falls down in process of erection, in consequence of the plans furnished to the contractors requiring the use of materials which are unsafe.³ Again, a contractor may be employed to do a particular job, under circumstances which leave the proprietor charged with the duty which regularly attaches to him to see that the work does not endanger the safety of others. A builder may make lawful and necessary excavations in the street;⁴ a blacksmith may remove a grating in the sidewalk to repair it;⁵ a coal merchant may make an opening in the sidewalk to deliver coal to his customer.⁶ In all these cases, the liability to guard the excavation may remain upon the proprietor, and he may be chargeable for any damages resulting from his failure so to do. It has been well laid down, that if the building of a house is split up

¹ 2 Thompson on Negligence, p. 908.

² 2 Thompson on Negligence, sec. 29, p. 907.

³ Horner v. Nicholson, 56 Mo. 220.

⁴ Robbins v. Chicago, 2 Black, 418;

4 Wall. 657; Homan v. Stanley, 66

Pa. St. 464; 5 Am. Rep. 389.

⁵ McCleary v. Kent, 3 Duer, 27.

⁶ Pickard v. Smith, 10 Com. B.,

N. S., 470.

into several different contracts, and the owner undertakes to supply the materials, and no provision is made for the supervision of the work, or for maintaining guards, the duty of protecting the public remains on the owner.¹ If the proprietor interferes with the work of the contractor, and directs a particular thing to be done, from which injury results, obviously he will be liable, for it is his own personal act."²

ILLUSTRATIONS.—O. and M. contracted with defendant to put a cornice on its mill, any scaffolding required for that purpose to be erected free of cost to them. Plaintiff's intestate, a workman in the employ of O. and M., while engaged in the work, was killed by the fall of a scaffold erected by defendant for that purpose. In an action to recover damages, plaintiff was nonsuited, upon the ground that defendant owed no duty to deceased in respect to the construction of the scaffold. *Held*, error; that the scaffold being erected by defendant upon its own premises for the express purpose of accommodating the workmen, a duty was imposed upon it toward them to use proper diligence in constructing and maintaining the structure; and that this duty existed independently of the contract: *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; 15 Am. Rep. 387.

§ 301. **Master not Liable for Injury to Servant.**—As a general rule, subject to certain exceptions to be afterwards noticed, a master is not liable for an injury to a servant while in his service, caused by the negligence of a fellow-servant. This important exception to the maxim *respondet superior* is generally said to be founded upon an implied contract on the part of the servant in entering the employment that he will assume the ordinary risks thereof, one of which is the risk of being injured by the negligence of a fellow-servant.³ The rule that a servant

¹ *Homan v. Stanley*, 66 Pa. St. 464; 5 Am. Rep. 389.

² *Jones v. Chantry*, 4 Thomp. & C. 63.

³ *Priestley v. Fowler*, 3 Mees. & W. 1, is regarded as the leading English case on this topic, and *Farwell v. Boston R. Co.*, 4 Met. 49, 38 Am. Dec. 339, the leading American adjudication. In

Priestley v. Fowler, Lord Abinger, C. B., said: "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by its duty or by the terms of his contract for all the consequences of negligence in a matter in which he is a principal is responsible for the

cannot recover of his master for damage sustained from the negligence of his fellow-servant does not prevent his

negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness, arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house whereby it fell, and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences affords a sufficient argument against the application of this principle to the present case. But in truth the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that

sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." In *Farwell v. Boston R. R. Co.*, Chief Justice Shaw urges similar reasons against such a liability. He says: "The general rule resulting from considerations as well of justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. . . . Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the oth-

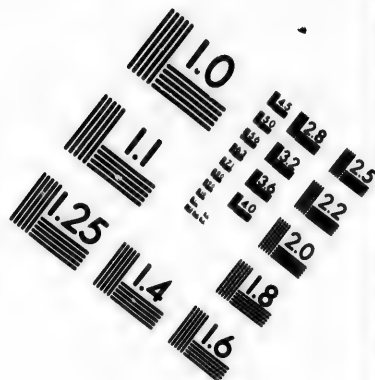
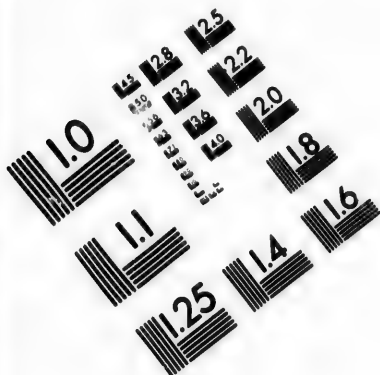
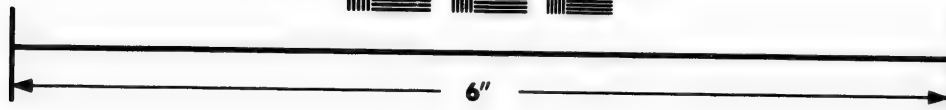
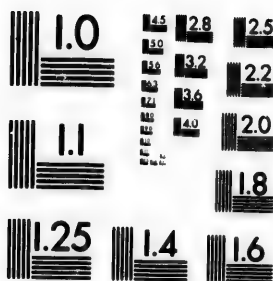


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maintaining an action against his master for consequential damages by him sustained through an injury to his wife from such negligence.¹ The rule is also in no way affected by the fact that both servants, at the time of the accident, were illegally employed, the day being Sunday.²

ILLUSTRATIONS. — Plaintiff was employed by defendant to remove the sand or "form" from a large oven recently built by defendant's lessor. The oven fell in, injuring plaintiff. There was no evidence of knowledge on defendant's part of the dangerous condition of the oven, and there was nothing charging defendant with negligence in not possessing knowledge. *Held*, that a verdict for plaintiff must be set aside: *Nason v. West*, 78 Me. 253. An elevator boy, engineer, and plaintiff were in defendant's employ. The engineer's duty was to furnish the motive power for an elevator, which the boy ran, and which carried plaintiff to his work. The engineer always took the elevator on a trial trip every morning with nobody on board. On one occasion plaintiff entered the elevator in the morning, shortly before the hour when he was required to go to work, just as the engineer was making the trial trip. The elevator boy was not there, and plaintiff was injured. *Held*, that if the injury was

ers, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." These positions are supported and followed by a host of authorities, both in this country and in England. The rule in the text, in its broadest statement, is so well settled that it will serve no purpose to set out the mass of authorities in this note. They may be found collected and arranged according to states up to the year 1880 in 2 Thompson on Negligence, p. 969, sec. 1; and see *Murray v. South Carolina* R. R. Co., 1 McMull. Eq. 385; 36 Am. Dec. 269; *Shields v. Yonge*, 15 Ga. 349; 60 Am. Dec. 698; *Slater v. Jowett*, 85 N. Y. 61; 2 Am. Rep. 627; *Fox v. Sandford*, 4 Sneed, 36; 67 Am. Dec. 587; *Illinois etc. R. R. Co. v. Cox*, 21 Ill. 20; 71 Am. Dec. 298;

Ohio etc. R. R. Co. v. Tindal, 13 Ind. 366; 74 Am. Dec. 259; *McCosker v. R. R. Co.*, 84 N. Y. 77; *Sykes v. Packer*, 99 Pa. St. 465; *Pin-gree v. Leyland*, 135 Mass. 398; *Yeaton v. R. R. Co.*, 135 Mass. 418; *Frazier v. R. R. Co.*, 38 Pa. St. 104; 80 Am. Dec. 461; *Louisville etc. R. R. Co. v. Collins*, 2 Duvall, 114; 87 Am. Dec. 486; *Gilman v. R. R. Co.*, 10 Allen, 233; 87 Am. Dec. 635; *Fisk v. Cent. Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22; *Casey v. R. R. Co.*, 84 Ky. 79; *Fort Hill Stone Co. v. Orm*, 84 Ky. 183; *Hoar v. Merritt*, 62 Mich. 386; *Collyer v. R. R. Co.*, 49 N. J. L. 59; *Alleghany Heating Co. v. Rohan*, 118 Pa. St. 223; *Moran v. Brown*, 27 Mo. App. 457. A female servant cannot bring an action against her master for persuading her to have sexual intercourse with an infant fellow-servant: *Jordan v. Hovey*, 72 Mo. 574; 37 Am. Rep. 447.

¹ *Gannon v. R. R. Co.*, 112 Mass. 234; 17 Am. Rep. 82.

² *Houston etc. R. R. Co. v. Rider*, 62 Tex. 267.

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caused by negligence other than that of plaintiff, it was the negligence of the elevator boy or the engineer, who were plaintiff's fellow-servants, for which defendant was not liable: *Wolcott v. Studebaker*, 34 Fed. Rep. 8. A fireman was killed while cleaning the ash-pan of his locomotive, by the running of a work-train, contrary to the rules of the road, into the fireman's train. Held, that this was one of the ordinary hazards of his employment, for which his administrator could not recover: *Wabash, St. Louis etc. R. R. Co. v. Conkling*, 15 Ill. App. 157. A transportation company paid a stevedore to load a ship. Through the stevedore's negligence one of his men received an injury. Held, that he could not recover against the company: *Rankin v. Merchants' and Miners' Trans. Co.*, 73 Ga. 229; 54 Am. Rep. 874. Two distinct corporations operated two separate portions of a through-line of travel connecting at a common terminus. Each sold tickets over the entire route, but divided the receipts between them proportionately. Held, that there was no such legal identity between them as would render their respective employees servants of a common master so as to prevent the maintenance of an action by the employee of one of them against the other for personal injuries occasioned through the negligence of its servants: *Carroll v. Railroad Co.*, 13 Minn. 30; 97 Am. Dec. 221.

§ 302. Exceptions — Defective Machinery, Buildings, or Appliances.—But the rule in the last section is subject, as before said, to many qualifications. The first of these is, that the master being by law bound to take reasonable care not to subject the servant to extraordinary danger, he will be liable for an injury to the servant, caused by defective or unsafe buildings, machinery, or appliances.¹ The master is not a warrantor of the safety

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¹ See cases cited in 2 Thompson on Negligence, 973; Connolly v. Poillon, 41 Barb. 366; Keegan v. Railroad Co., 8 N. Y. 175; 59 Am. Dec. 476; Chicago etc. R. R. Co. v. Jackson, 55 Ill. 492; 8 Am. Rep. 661; Noyes v. Smith, 28 Vt. 59; 65 Am. Dec. 222; McMillan v. Union Press Brick Works, 6 Mo. App. 434; Buzzell v. Laconia Mfg. Co., 48 Me. 113; 77 Am. Dec. 212; and see note to this case in 77 Am. Dec. 218-225; Nashville etc. R. R. Co. v. Elliott, 1 Cold. 611; 78 Am. Dec. 506; Ryan v. Fowler, 24 N. Y. 410; 82 Am. Dec. 315; Thayer v. Railroad Co., 22 Ind. 26; 85 Am. Dec. 409; Snow v. Railroad Co., 8 Allen, 441; 85 Am. Dec. 720; Rogers v. Ludlow Mfg. Co., 144 Mass. 198; 59 Am. Rep. 68; Rice v. King Phillip Mills, 144 Mass. 229; 59 Am. Rep. 83; Boardman v. Brown, 44 Hun, 336; Pennsylvania etc. R. R. Co. v. Mason, 109 Pa. St. 296; 58 Am. Rep. 722; Brossman v. Railroad Co., 113 Pa. St. 490; 57 Am. Rep. 479; Goodman v. Richmond R. R. Co., 81 Va. 576; Wormell v. Maine Cent. R. R. Co.,

and sufficiency of his machinery and appliances. He is required but to use reasonable and ordinary care in selecting and maintaining them.¹ It is not a universal rule of law that it is always an employer's duty to furnish suitable appliances; and an instruction assuming this affords ground for reversal.² To render the master liable for an injury to his employee, caused by defective

79 Me. 397; 1 Am. St. Rep. 321; *Robertson v. Cornelson*, 34 Fed. Rep. 716; *Little Rock etc. R. R. Co. v. Leverett*, 48 Ark. 333; *Krueger v. R. R. Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Covey v. R. R. Co.*, 27 Mo. App. 170.

¹ *Daubert v. Pickel*, 4 Mo. App. 590; *Whalen v. Centenary Church*, 62 Mo. 327; *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317; *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Jones v. Yeager*, 2 Dill. 64; *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 467; *Locke v. Sioux City etc. R. R. Co.*, 46 Iowa, 109; *Cooper v. Iowa Central R. R. Co.*, 44 Iowa, 134; *St. Louis etc. R. R. Co. v. Valirius*, 56 Ind. 511; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Nashville etc. R. R. Co. v. Jones*, 9 Heisk. 27; *Connolly v. Poillon*, 41 Barb. 365; *Houston etc. R. R. Co. v. Oram*, 49 Tex. 341; *International etc. R. R. Co. v. Doyle*, 49 Tex. 190; *King v. R. R. Co.*, 9 Cush. 112; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541; 67 Am. Dec. 312; *Leonard v. Collins*, 70 N. Y. 90; *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 554; *Shanny v. Androscoggin Mills*, 66 Mo. 420; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; 2 Am. Rep. 497; *Lawler v. Railroad Co.*, 62 Me. 463; 16 Am. Rep. 492; *Hough v. Railroad Co.*, 103 U. S. 213; *De Graff v. Railroad Co.*, 76 N. Y. 125; *Chicago R. R. Co. v. Mahoney*, 4 Ill. App. 262; *Painton v. Railroad Co.*, 83 N. Y. 7; *Jones v. Railroad Co.*, 22 Hun, 284; *Little Rock R. R. Co. v. Duffey*, 35 Ark. 602; *Kranz v. White*, 8 Ill. App. 583; *Mansfield Coal Co. v. McEnery*, 91 Pa. St. 185; *King v. R. R. Co.*, 14 Fed. Rep. 277; *Buckley v. Mining Co.*, 14 Fed. Rep. 833; *Payne v. Reese*, 100 Pa. St. 301; *Missouri R. R. Co. v. Lyde*, 57 Tex. 565; *Wabash etc. R. R. Co. v. Fenton*, 12

Ill. App. 417; *Chicago etc. R. R. Co. v. Bragonier*, 11 Ill. App. 516; *Armour v. Hahn*, 111 U. S. 313; *Bajus v. Railroad Co.*, 103 N. Y. 312; 57 Am. Rep. 723; *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519; 4 Am. St. Rep. 613; *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348; *Weibber v. Piper*, 109 N. Y. 496. In *Baker v. Railroad Co.*, 95 Pa. St. 211, 40 Am. Rep. 634, the rule of law is concisely stated by Sharswood, C. J.: "A servant assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence. If it has resulted from the negligence of a fellow-servant in the same employment, he must look to him, and not to the master, for redress. The master does not warrant him against such negligence. The duty which the master owes to his servants is to provide them with safe tools and machinery where that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use, it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use, not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself."

² *Robinson v. George F. Blake Mfg. Co.*, 143 Mass. 528.

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machinery, it must appear that the master knew, or by the exercise of proper diligence ought to have known, of its unfitness, and that the servant did not know, or could not reasonably be held to have known, of the defect.¹ The danger must be shown to be such as to suggest itself to a man of ordinary prudence.² As between master and servant, the fact that the appliance is defective, and the servant is injured, does not raise a presumption of negligence in the master.³ The master is not compelled to provide the safest and newest machinery, or the newest inventions.⁴ The owner of a mine is not bound to employ the most expensive precautions against fire-damp, but only to use reasonable efforts for ventilation.⁵ A master, in the absence of a statute, is not bound to provide means of escape from a factory where the fire is not caused by his neglect.⁶ A railroad is not bound to discard cars of an old pattern because the coupling of them with cars of a new pattern is attended with more danger than the coupling of new cars with each other.⁷ Nor to adopt what is known as the "target switch," simply because this kind of switch guards more effectually against the negligence of switchmen than the common switch, it appearing that the latter is safe when properly operated.⁸ Nor is it bound to pursue a system of inspection of its cars and locomotives which would embarrass the operation of the road, but simply to exercise

¹ Hull v. Hall, 78 Me. 114.

² Nelson v. Allen Paper Car-wheel Co., 29 Fed. Rep. 840.

³ Bowen v. Railroad Co., 95 Mo. 268; Cahill v. Hilton, 106 N. Y. 513; Philadelphia etc. R. R. Co. v. Hughes, 119 Pa. St. 301.

⁴ Fort Wayne R. R. Co. v. Gildersleeve, 33 Mich. 133; Botsford v. Railroad Co., 33 Mich. 256; Jones v. Granite Mills, 126 Mass. 84; 30 Am. Rep. 661; Toledo etc. R. R. Co. v. Asbury, 84 Ill. 429; Wonder v. Railroad Co., 32 Md. 411; 3 Am. Rep. 143; Philadelphia etc. R. R. Co. v. Keenan, 103 Pa. St. 124; Burns v.

Railroad Co., 69 Iowa, 450; 58 Am. Rep. 227.

⁵ Berns v. Gaston Gas Coal Co., 27 W. Va. 285; 55 Am. Rep. 304. But see St. Louis etc. R. R. Co. v. Valirius, 56 Ind. 511; Nashville etc. R. R. Co. v. Elliott, 1 Cold. 611; 78 Am. Dec. 506.

⁶ Jones v. Granite Mills, 126 Mass. 84; 30 Am. Rep. 661; Keith v. Granite Mills, 126 Mass. 90; 30 Am. Rep. 666.

⁷ Fort Wayne etc. R. R. Co. v. Gildersleeve, 33 Mich. 133.

⁸ Salters v. Canal Co., 3 Hun, 338.

ordinary care.¹ The master must establish proper rules for the guidance of his employees and their safety.²

ILLUSTRATIONS.—A railroad engineer was killed by the explosion of a locomotive boiler. The boiler was made of the best material, and by first-class manufacturers; it had not been used long enough to create a reasonable suspicion of its unsafe condition, the defect could not have been discovered by any of the usual tests, and its appearance did not indicate its unsafe condition. *Held*, that the company was not answerable, being bound only to provide machinery of good material, constructed in a workmanlike manner: *Indianapolis etc. R. R. Co. v. Toy*, 91 Ill. 474; 33 Am. Rep. 57. The proprietor of an establishment, in one room of which about twenty girls were employed, removed an engine from one room of the factory to another. Being pressed with business, they made the change in the nighttime; and in the morning the machine was left in such a position that the main shaft projected through the wall into this room from four to six feet. In this state, the machinery was put in motion. One of the girls, in passing near the revolving shaft about her work, was caught by it and fatally injured. *Held*, that the proprietors were liable for damages: *Fairbank v. Haentzsch*, 73 Ill. 237. A hook in an iron foundry, which a careful inspection would have shown to be weak, broke, and a heavy weight hung on it fell and injured a workman. *Held*, that he could maintain an action against his employer, whose duty required an inspection of the hook: *Spicer v. South Boston Iron Co.*, 138 Mass. 426. A corporation believed, and was justified in believing, that a certain quantity of grain could be safely stored on a floor of their building. *Held*, that the fact that the floor gave way, without warning, was not sufficient to render the corporation liable in damages to one of its employees who was injured by the fall: *Dillon v. Sixth Av. R. R. Co.*, 48 N. Y. Sup. Ct. 283. A factory girl was injured by the fall of a privy attached to the factory and rendered insecure by certain circumstances, which, with this natural consequence thereof, were proved to have been known to and unremedied by the owner. *Held*, that the girl might recover from the owner, her employer, damages for her injuries: *Ryan v. Fowler*, 24 N. Y. 410; 82 Am. Dec. 315. A hoisting apparatus consisting of several pieces, and set up on the ground, fell because of carelessness in setting an anchor-post. *Held*, that the apparatus was not to be deemed a single machine, for a defect in which the master was liable to the servant injured by the fall, but that

¹ *Smoot v. Railroad Co.*, 67 Ala. 13. *Pennsylvania Co. v. Whitcomb*, 111

² *Schmidt v. Block*, 76 Ga. 823; *Ind.* 212.

the case was that of the negligence of a fellow-servant: *Peschel v. Railroad Co.*, 62 Wis. 338. The engineer and fireman were killed by the explosion of a locomotive boiler, which had been recently and insufficiently repaired in the shops of the railroad company. *Held*, that the company is not relieved from liability by the fact that the repairers and the deceased were fellow-servants, although under the same superintendent: *Penn. etc. R. R. Co. v. Mason*, 109 Pa. St. 296; 58 Am. Rep. 723. Plaintiff, conductor on a freight train, was injured by the giving way of a defective ladder on one of the cars. The negligence of the defendant railroad company was clearly shown, and the plaintiff testified that he had no suspicion of the unsafe condition of the ladder. *Held*, that a verdict for plaintiff should not be set aside: *Goodman v. Richmond and Danville R. R. Co.*, 81 Va. 576. A laborer was killed by something, supposed to be a brick, falling on his head from above. There was evidence tending to show a want of protection against such an accident. *Held*, that a verdict against the owner of the building should not be disturbed: *Ford v. Lyons*, 41 Hun, 512.

§ 303. **Latent Defects and Dangers.**—The servant takes the risk of "seen dangers," but the master is under a duty to exercise reasonable care in protecting him from latent defects in the machinery or appliances which he uses,¹ or dangerous services unknown to him.² It is the duty of a proprietor of a lime-kiln to warn an inexperienced laborer on the kiln of the danger of falling into the fire by the removal of the stone at the base, and the consequent subsidence of the mass above, upon which he is employed to work.³ The tendency of a board, when warped, to spring back during the operation of being

¹ *Paulinier v. Erie R. R. Co.*, 34 N. Am. St. Rep. 675; *Little Rock etc. R. R. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Clapp v. Minnesota etc. R. Co.*, 36 Minn. 6; *Steen v. St. Paul etc. R. R. Co.*, 37 Minn. 310; *Wuotilla v. Railroad Co.*, 37 Minn. 153.
² *Baxter v. Roberts*, 44 Cal. 187; 13 Am. Rep. 160; *Jones v. Mining Co.*, 66 Wis. 268; 57 Am. Rep. 239; *Olsen v. McMullen*, 34 Minn. 94.
³ *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28.

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sawed by a circular saw is not so obvious that an inexperienced workman must be held necessarily to take cognizance of it without being warned.¹

ILLUSTRATIONS.—The plaintiff engaged in the service of a corporation as a miner. At that time ordinary blasting-powder was used. Subsequently giant-powder, a more dangerous explosive, was substituted by order of the president. The plaintiff was not informed of the proper mode of using it, although the corporation had printed directions. The plaintiff was injured by an explosion. *Held*, that the corporation was liable: *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; 36 Am. Rep. 535. Defendant claimed title to land occupied by other persons, who threatened to resist by force any interference with their possession. Defendant, knowing this, but, without communicating it to plaintiff, employed plaintiff to go with him to the land to do some work, in doing which plaintiff was shot by the persons in possession. *Held*, that he might recover against defendant for the damage so suffered by him: *Baxter v. Roberts*, 44 Cal. 187; 13 Am. Rep. 160. An employee, who was not a ship-carpenter or a joiner, or a mechanic of any kind, and who knew nothing about the construction of scaffolding, or the forces which it would be required to resist, was put into the hold of a gunboat by his employer, to remove the chips and rubbish from beneath a scaffold. *Held*, that he had a right to rely upon the superior knowledge of his employer, who was a ship-builder, and his care and prudence that the scaffolding was of sufficient and adequate strength to insure him against all harm: *Connolly v. Poillon*, 41 Barb. 366. A's business of hauling for B required him to drive under a revolving shaft, which, without his knowledge, was repaired between two of his trips in such a manner that there was not room to drive under it without injury. The change was not apparent, and A was not warned thereof. *Held*, that B was liable for injuries sustained: *Hawkins v. Johnson*, 105 Ind. 39; 55 Am. Rep. 169. Plaintiff was employed as "inside helper" at defendant's furnace for smelting ores. One of plaintiff's duties was to take the hot slag from the furnace. In front of the furnace was a slight depression in the floor, in which, usually, water lay. Plaintiff was not warned of the certainty of a powerful explosion in case of the hot slag coming in contact with water. On the third day of plaintiff's employment, as he was removing a pot of slag from the furnace, the pot tipped over, the slag came in contact with the water, a powerful explosion followed, and plaintiff sustained the injury to recover damages for which he sued his employer. *Held*, that defendant

¹ *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294.

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was at fault for not warning plaintiff, and that a recovery might be had: *McGowan v. La Plata Mining and Smelting Co.*, 3 McCrary, 393. A "helper" of considerable experience in coupling cars was injured in attempting to couple a car constructed in a peculiar and dangerous manner, which he had never seen. He was not warned concerning it. *Held*, that he could recover for the injury: *Missouri Pacific Ry Co. v. Callbreath*, 66 Tex. 526. Plaintiff, a laborer, was called in to assist defendant in moving a heavy safe, and was told the appliances were safe. Defendant supervised their arrangement, and plaintiff did as he was told. The framework gave way and plaintiff was injured. *Held*, that his action was maintainable: *Bradbury v. Goodwin*, 108 Ind. 286. Plaintiff, a carpenter in defendant's employ, was sent by it to remove one of its electric lamps, and connect the wires with the circuit. The evidence showed that the usual time for turning on the electric current was 4:30, p. m., on cloudy days, and 4:45, p. m., on clear days. Plaintiff testified that when he reached the lamp, and began work, it was barely 4:15, p. m., and that the day was clear; that he knew nothing about electric wires, the work assigned him being outside the scope of his employment; that while handling the wires the current was turned on, and he received a shock, producing the injuries sued for. *Held*, that a nonsuit was properly refused; the questions of negligence and contributory negligence being for the jury: *Colorado Electric Co. v. Luthers*, Col., 1888. A railroad company used an engine, which, from being out of repair, was accustomed to move automatically and without warning. Plaintiff, an engine-cleaner in the employ of the company, was ordered to go into the pit under the engine to clean it. He did not know of the defect in the engine, nor was he informed of it. While he was cleaning it, it suddenly moved back three feet automatically, cutting off his fingers. *Held*, that the company was liable: *Atchison, Topeka etc. R. R. Co. v. Holt*, 29 Kan. 149. Plaintiff, a detective in the employ of defendant railroad company, was directed to go from one station to another on a hand-car belonging to the company, and was ordered by the man in charge of the hand-car to sit with his feet hanging over the rear end. He was injured by reason of planks being between the rails. No harm would have happened had his feet been inside the car. *Held*, that a verdict for the plaintiff would not be disturbed: *Pool v. Railroad Co.*, 56 Wis. 227. An employee, a green hand, was put in charge of machinery, which outwardly indicated no danger, as attendant upon the wiping of a certain plate attached to it, and was directed by the superintendent to wipe such plate, without any caution, whereby he was injured. *Held*, that he was not negligent in failing to so examine the

machinery as to have perceived the danger: *Howard Oil Co. v. Farmer*, 56 Tex. 301. A railroad company furnished its employee a hand-car with a handle of brash, brittle wood, which from its being painted, and because of his near-sightedness, plaintiff could not see to be defective. *Held*, that the company was liable for an injury caused by the handle's breaking while being properly used: *Siela v. Railroad Co.*, 82 Mo. 430.

§ 304. Duty of Railroad Companies to Servants Employed.—Railroad companies must keep their machinery, roadway, and bridges—their appliances for the carrying on of their business—in such a safe and good condition as care and foresight are able to accomplish.¹ But a railroad is not bound to furnish absolutely safe appliances.² A railroad company is under no obligation to build its bridges so high that a man standing on a box-car or on the top of a car may pass under safely.³ Nor is it liable for the death of a brakeman, caused by his falling through a bridge in process of repair, upon which the train had stopped at night.⁴ A railroad company receiving a loaded car from another company, to be run over its road, is not bound to test the safety of the car for its servants, but may assume its safety unless

¹ Toledo etc. R. R. Co. v. Conroy, 61 Ill. 162; 63 Ill. 567; Chicago etc. R. R. Co. v. Swett, 45 Ill. 201; 92 Am. Dec. 296; Illinois etc. R. R. Co. v. Welch, 52 Ill. 183; Illinois etc. R. R. Co. v. Phillips, 49 Ill. 234; Pittsburg etc. R. R. Co. v. Thompson, 56 Ill. 138; Houston etc. R. R. Co. v. Oram, 49 Tex. 341; Flike v. Railroad Co., 53 N. Y. 549; 13 Am. Rep. 545; Chicago etc. R. R. Co. v. Taylor, 69 Ill. 461; 18 Am. Rep. 626; Brann v. Railroad Co., 53 Iowa, 595; 36 Am. Rep. 243; Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Holden v. Fitchburg R. R. Co., 129 Mass. 268; 37 Am. Rep. 343; Baker v. Railroad Co., 95 Pa. St. 211; 40 Am. Rep. 634; Trask v. California R. R. Co., 63 Cal. 96; Thayer v. St. Louis etc. R. R. Co., 22 Ind. 26; 85 Am. Dec. 409; St. Louis etc. R. R. Co. v. Irwin, 37 Kan. 701; 1 Am. St. Rep. 266; Clapp v. Railroad

Co., 36 Minn. 6; 1 Am. St. Rep. 629; Little Rock etc. R. R. Co. v. Leverett, 48 Ark. 333; 3 Am. St. Rep. 231; Little Rock etc. R. R. Co. v. Eubanks, 48 Ark. 460; 3 Am. St. Rep. 245; Franklin v. Railroad Co., 37 Minn. 409; Huhn v. Railroad Co., 92 Mo. 440; Parsons v. Railroad Co., 94 Mo. 236; Collyer v. Railroad Co., 49 N. J. L. 59; Bushby v. Railroad Co., 107 N. Y. 374.

² Tabler v. Railroad Co., 93 Mo. 79; Gutridge v. Railroad Co., 94 Mo. 468; 4 Am. St. Rep. 392; Bowen v. Railroad Co., 95 Mo. 268.

³ Baylor v. Railroad Co., 40 N. J. L. 23; 29 Am. Rep. 209; Rains v. Railroad Co., 71 Mo. 161; 36 Am. Rep. 459; Devitt v. Railroad Co., 50 Mo. 302; Baltimore etc. R. R. Co. v. Stricker, 51 Md. 47; 34 Am. Rep. 291.

⁴ Koontz v. Railroad Co., 65 Iowa, 224; 54 Am. Rep. 5.

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the contrary appears.¹ Where a railroad company buys the line of another company, embracing a bridge obviously unsafe in plan and construction, and fails to correct the defects, and one of its employees is injured by the fall of the bridge, the company is liable, although the bridge had been in use for several years before the purchase without accident.² A railroad company is liable for an injury to a brakeman in carefully coupling cars, occasioned by its negligently leaving sticks of firewood scattered along beside the track at the station.³ But that a brakeman is required to couple cars having dissimilar draw-heads does not necessarily make the company liable for any injury sustained by him while coupling such cars.⁴ Railroad companies must use ordinary prudence in making and publishing to their employees sufficient and necessary rules and regulations for the safe running of their trains, and for the government of their employees. For an injury to one of their employees, arising from the want of such regulations, they are liable.⁵

ILLUSTRATIONS.—A brakeman in coupling freight-cars for the defendant was injured by a loose dead-wood on a car which had come from another road. The defendant had competent inspectors, whose business it was to reject such cars. *Held*, that the brakeman could not recover of the defendant: *Smith v. Railroad Co.*, 46 Mich. 258; 41 Am. Rep. 161. A railroad brakeman, suddenly called to supper by the conductor, slipped on snow and ice accumulated near the station platform, and was injured. *Held*, that the company was not liable: *Piquegno v. Railroad Co.*, 52 Mich. 40; 50 Am. Rep. 243. A brakeman in defendant's employ, descending the ladder of a moving freight-car to throw a switch, was struck by a telegraph pole standing only eighteen inches from the car, and killed.

¹ *Ballou v. Chicago, Minneapolis, & St. P. R. R. Co.*, 54 Wis. 259; 41 Am. Rep. 31. But see *Gutridge v. Missouri Pacific R. R. Co.*, 94 Mo. 468; 4 Am. St. Rep. 392.

² *Vosburgh v. Railroad Co.*, 94 N. Y. 374; 46 Am. Rep. 148.

³ *Hulehan v. Railway Co.*, 58 Wis. 319.

⁴ *Woodworth v. Railway Co.*, 18 Fed. Rep. 282.

⁵ *Cooper v. Railroad Co.*, 44 Iowa, 134; *Chicago etc. R. R. Co. v. Taylor*, 69 Ill. 461; *Bushby v. Railroad Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844; *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Reagan v. Railroad Co.*, 93 Mo. 348; 3 Am. St. Rep. 542.

The pole had been suffered to remain in that position three years, but there was no evidence that defendant put it there or knew of its existence. There was no evidence that the brakeman knew of it. *Held*, that an action for damages for the killing was maintainable: *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54. A brakeman caught his foot in a frog and was injured. *Held*, that the company incurred no special liability for not having blocked its frogs, it not being shown that greater risks might not thereby be incurred than those averted: *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466. One of three railroad companies employed a switchman to work in their union yard. *Held*, that all were jointly and severally liable to him for the negligence of one of the companies, and that the company which employed him could not deny the relation of master and servant: *Gulf, Colorado, etc. R'y Co. v. Dorsey*, 66 Tex. 148. A railroad company used on its cars the same kind of oil that was generally used upon cars, and had no knowledge, and by the exercise of ordinary care would not have obtained any knowledge, of anything poisonous connected therewith. *Held*, that plaintiff employee could not recover for being poisoned thereby: *Kitteringham v. Railway Co.*, 62 Iowa, 285. A track-repairer was run over after nightfall by a locomotive furnished with a proper head-light, which, however, was not lighted. *Held*, that while failure to provide a head-light would have made the company liable, it was not liable to the person injured for the failure to light the one provided, the neglect being that of his fellow-servant: *Collins v. Railroad Co.*, 30 Minn. 31. A brakeman was injured because of defective buffers. *Held*, that he might maintain an action against the railroad company: *Ellis v. Railway Co.*, 95 N. Y. 546. A section-hand in the employ of defendant company, while in performance of his duties, took a hand-car off the track to allow a train to pass, and while standing near it was struck in the eye by steam and water thrown from the passing engine. *Held*, that he had a cause of action: *Atchison etc. R. R. Co. v. Thul*, 32 Kan. 255; 49 Am. Rep. 484. Defendant company put a freight-car into the train at night, the handle to the ladder of which had been broken for some time, and plaintiff's intestate, in attempting to descend, grasped at the handle, missed it, fell, and was killed. *Held*, that the company was liable: *Richmond etc. R. R. Co. v. Moore*, 78 Va. 93.

§ 305. **Knowledge by Master of Defect Necessary.**— Knowledge on the part of the master of the defect is necessary to fix his liability. Unless the master knew of

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the defect which produced the injury or ought to have known it, he cannot be held liable.¹ Negligent ignorance is equivalent to knowledge.² "Notice of a given defect to that servant or agent of the common master whose duty it is to keep the particular machinery in repair, or guard against the injurious consequences of any defects therein, if given while such servant or agent is acting about such business of the master, will be notice to the master;³ and it has been so held in cases of corporations.⁴ Under this rule, notice of a defect in a railway track to the superintendent and foreman,⁵ to the assistant superintendent,⁶ to the foreman of a gang of men employed by the company to repair its track,⁷ to an engineer in charge of an engine engaged in pushing freight-cars up an incline,⁸ has been held notice to the company. So, notice of the condition of a defective railway locomotive is notice to

¹ Elliott v. Railroad Co., 67 Mo. 272; Toledo etc. R. R. Co. v. Conroy, 61 Ill. 162; Columbus etc. R. R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 579; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Faulkner v. Railroad Co., 49 Barb. 324; Chicago etc. R. R. Co. v. Shannon, 43 Ill. 338; Chicago etc. R. R. Co. v. Platt, 89 Ill. 141; Huffman v. Railroad Co., 78 Mo. 50.

² Noyes v. Smith, 28 Vt. 59; 64 Am. Dec. 222; Toledo etc. R. R. Co. v. Conroy, 61 Ill. 164; 68 Ill. 560, 569; Walsh v. Peet Valve Mfg. Co., 110 Mass. 23; Mobile etc. R. R. Co. v. Thomas, 42 Ala. 672; Wright v. New York etc. R. R. Co., 25 N. Y. 562; Sullivan v. Louisville Bridge Co., 9 Bush, 81, 90; Ryan v. Fowler, 24 N. Y. 410, 414; 82 Am. Dec. 315; Chicago etc. R. R. Co. v. Swett, 45 Ill. 197; 92 Am. Dec. 206; Chicago etc. R. R. Co. v. Shannon, 43 Ill. 338; Columbus etc. R. R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 579; Greenleaf v. Illinois etc. R. R. Co., 29 Iowa, 14; 4 Am. Rep. 181; Schooner Norway v. Jensen, 52 Ill. 373; Colorado etc. R. R. Co. v. Ogden, 3 Col. 497; Faulkner v. Erie R. R. Co., 49 Barb. 324; Lewis v. St. Louis etc. R. Co., 59 Mo. 495; 21 Am. Rep. 385; Gibson v. Pacific R. R. Co., 46 Mo.

163; 2 Am. Rep. 497. "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is stanch and secure, when in fact the master knows, or ought to know, that it is not so": Lord Cranworth, in Paterson v. Wallace, 1 Macq. 748; contra, and holding actual notice to be necessary, see Anderson v. Steamboat Co., 7 Robt. 611; King v. Stewart, 1 Daly, 431; McMullan v. Railroad Co., 20 Barb. 450.

³ Wade on Notice, sec. 672; Story on Agency, secs. 140, 451; Wharton on Agency, sec. 178.

⁴ Patterson v. Pittsburgh etc. R. R. Co., 76 Pa. St. 389; 18 Am. Rep. 412; Colorado etc. R. R. Co. v. Ogden, 3 Col. 499; Bralibbitts v. Chicago etc. R. R. Co., 38 Wis. 289; Nashville etc. R. R. Co. v. Elliott, 1 Coldw. 611, 618; 78 Am. Dec. 506; Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104; 80 Am. Dec. 467.

⁵ Patterson v. Pittsburgh etc. R. R. Co., 76 Pa. St. 389; 18 Am. Rep. 412.

⁶ Colorado etc. R. R. Co. v. Ogden, 3 Col. 499.

⁷ Gage v. Delaware etc. R. R. Co., 14 Hun, 446.

⁸ Nashville etc. R. R. Co. v. Elliott, 1 Cold. 611; 78 Am. Dec. 506.

the company, if given to the foreman of the road-house and superintendent of machinery,¹ or to the foreman² of the company's repair shops."³

ILLUSTRATIONS.—A switchman was coupling cars, the engine attached suddenly started, and the switchman was injured. It appeared that the sudden starting of the engine was caused by a defect which the engineer had before reported to the company as making the engine dangerous. *Held*, that these facts justified a verdict against the company, in an action brought by the switchman: *Chicago and Eastern R. R. Co. v. Rung*, 104 Ill. 641. A was employed by B to run his elevator, which was new and made by a first-class machinist. The chain broke, and A was injured. B's engineer had previously told B's manager that the chain was not strong enough. *Held*, that A could maintain an action against B: *Delaney v. Hilton*, 50 N. Y. Sup. Ct. 341. Plaintiff, a workman in a coal mine, was injured by the fall of a rock. There had been a crack for some time where the rock broke off, and the superintendent of the mine knew that it was widening and was dangerous. *Held*, that the mine-owner was liable for the injury: *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 368. The plaintiff, being employed as a common laborer by defendant, who was a brewer, was engaged in cleaning hogsheads by means of a steam apparatus, the use of which was explained to him. After he had been so employed for a number of days, he was injured by the explosion of a hogshead, caused by the pressure of steam. There was evidence that the apparatus was unsafe, owing to the omission of a certain gauge or valve, but it did not appear that the defendant knew or had reason to believe that it was dangerous in its actual condition. *Held*, that the defendant was not liable: *Loonam v. Brockway*, 3 Robt. 74; 28 Iowa Pr. 472. A owned a building on which B agreed, for a lump sum, to trim certain stone-work; B should have furnished his own scaffold, but as he did not, A allowed him to use one which had been hung by painters over a rotten cornice, which gave way and injured B. *Held*, that A was not liable: *Matthes v. Kerrigan*, 53 N. Y. Sup. Ct. 431.

§ 306. **Direct Negligence of Master.**—If an injury to the servant is owing to the direct negligence of the master, as where he is personally present, superintending the work and giving orders, the master is answerable for the

¹ *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338.

² *Brabbitts v. Chicago etc. R. R. Co.*, 33 Wis. 289.

³ 2 *Thompson on Negligence*, 994.

damages to the same extent as though the relation of master and servant did not exist. The master, although engaged at a common labor with the servant, does not become a fellow-servant.¹ Where a servant is assured by his employer that the spot where he is ordered to work is safe from the fall of bricks, and he relies upon the assurance and is injured by falling bricks, through no negligence of his own, he may maintain an action against his master.²

§ 307. Concurrent Negligence of Master and Fellow-servant.—If the negligence of the master, as by providing defective apparatus, etc., combines with the negligence of a servant, and the two together contribute to the injury of a fellow-servant, the master is responsible.³ That the

¹ *Ashworth v. Stanwix*, 3 El. & E. 701; *Roberts v. Smith*, 2 Hurl. & N. 213; *Ryan v. Fowler*, 24 N. Y. 410; 82 Am. Dec. 315; *McMahon v. Walsh*, 11 Jones & S. 36; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; 27 Am. Rep. 510; *Keegan v. Kavanaugh*, 62 Mo. 230; *Johnson v. Bruner*, 61 Pa. St. 58; 103 Am. Dec. 613; *Lorentz v. Robinson*, 61 Md. 64. "The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the change of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because by some arrangement between the joint masters one of them

takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow-laborer": *Ashworth v. Stanwix*, 3 El. & E. 701.

² *Daley v. Schaaf*, 28 Hun, 314.

³ *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317; *Crutchfield v. Railroad Co.*, 76 N. C. 320; *Booth v. Railroad Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Cone v. Railroad Co.*, 81 N. Y. 206; 37 Am. Rep. 491; *McMahon v. Henning*, 1 McCrary C. C. 516; *Boyes v. Fitzpatrick*, 80 Ind. 526; *Grand Trunk R. R. Co. v. Cummings*, 106 U. S. 700; *Daley v. Schaaf*, 28 Hun, 314; *Franklin v. Railroad Co.*, 37 Minn. 409. In *Paulmier v. Railroad Co.*, 34 N. J. L. 151, the track over a trestle-work was unsafe, and the engineer in charge had orders not to put the engine thereon, but disobeyed orders, and a fireman who was on the engine, and who was unaware of the orders or of the danger, was killed in consequence of the trestle-work giving way. It was held that the master was responsible, the court saying: "The servant does not agree to take the chances of any negligence on the part of his employer; and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not re-

servant disobeys the order of the master does not excuse the liability of the latter for his negligence.¹ A railroad company neglecting to see that there are a sufficient number of brakemen on a train when it starts on its trip is liable to a servant consequently injured without contributory negligence on his part, although the immediate negligence in so starting was that of a co-servant.²

ILLUSTRATIONS.—The fireman of an engine of a "wildcat" train was injured by a collision caused by the neglect of an agent and telegraph-operator, in the employ of the company, to strictly observe the rules laid down by the company for governing the movements of trains. *Held*, that the company was liable, every reasonable precaution to avoid the collision not having been taken: *Sheehan v. Railroad Co.*, 91 N. Y. 332.

§ 308. **Unsuitable or Incompetent Fellow-servants.**—Again, if the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause is unfit for the service in which he is engaged, and if in consequence of such unfitness an injury happens to another servant, the master must answer for the damages suffered by such servant.³ As to the

cover. It would be both unjust and impolitic to suffer the master to evade the penalty of his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be negligence of the party injured."

¹ *Mound City Paint Co. v. Conlon*, 92 Mo. 221.

² *Booth v. Railroad Co.*, 73 N. Y. 38; 29 Am. Rep. 97.

³ 2 Thompson on Negligence, p. 974, and cases cited; *Senior v. Ward*, 1 El. & E. 385; 5 Jur., N. S., 172; 23 L. J. Q. B. 139; 7 Week. Rep. 261; *Tarrant v. Webb*, 18 Com. B. 796; 25 L. J. Com. P. 261; *Walker v. Bolling*, 22

Ala. 294; *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323; *Illinois etc. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240; *Chicago etc. R. R. Co. v. Sullivan*, 63 Ill. 293; *Thayer v. St. Louis etc. R. R. Co.*, 22 Ind. 26; 85 Am. Dec. 409; *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28; 92 Am. Dec. 282; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Kansas etc. R. R. Co. v. Salmon*, 14 Kan. 512; 11 Kan. 83; *Chicago etc. R. R. Co. v. Doyle*, 18 Kan. 58; *Union Pacific R. R. Co. v. Young*, 19 Kan. 488; *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; 87 Am. Dec. 635; 13 Allen, 433; 90 Am. Dec. 210; *Cumberland etc. R. R.*

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selection and retention of servants, the master does not warrant anything. His duty is to use reasonable care in selecting them, and not to retain them after he has discovered their incompetency.' "The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continues in his employment after a knowledge of such incompetency or carelessness, or when, in the exercise of due care, he should have known it, as if he had been wanting in the same care in hiring."² When the unfitness is

Co. v. State, 44 Md. 283; Harper v. Indianapolis etc. R. R. Co., 47 Mo. 567; 4 Am. Rep. 353; Moss v. Pacific R. R., 49 Mo. 167; 8 Am. Rep. 126; Connor v. Chicago etc. R. R. Co., 59 Mo. 285; Lanning v. New York etc. R. R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Sizer v. Syracuse etc. R. R. Co., 7 Lans. 67; Chapman v. Erie R. R. Co., 1 Thomp. & C. 526; Hardy v. Carolina etc. R. R. Co., 76 N. C. 5; Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146. And see Baulec v. Railroad Co., 59 N. Y. 356; 17 Am. Rep. 325; Nordyke Co. v. Van Sant, 99 Ind. 188.

¹ Columbus etc. R. R. Co. v. Troesch, 68 Ill. 545, 550; 18 Am. Rep. 578; Tarrant v. Webb, 18 Com. B. 797; Michigan Central R. R. Co. v. Dolan, 32 Mich. 510; Union Pacific R. R. Co. v. Milliken, 8 Kan. 647; Lawler v. Railroad Co., 62 Me. 463; 16 Am. Rep. 492; Jordan v. Wells, 3 Woods, 527; Blake v. Railroad Co., 70 Me. 60; 35 Am. Rep. 297; Buckley v. Railroad Co., 14 Fed. Rep. 833; O'Connell v. Railroad Co., 20 Md. 212; 83 Am. Dec. 549. In Michigan etc. R. R. Co. v. Dolan, 32 Mich. 510, the court said: "A corporation stands on the same footing with an individual in this respect, and both are bound to use such care as the nature and dangers of their business require, and no more. In such a business as that of conducting

a railroad, personal presence of directors and officers all along the line would be impossible. The charge of looking after various divisions of business and local management must of necessity be given to many subordinates, of greater or less authority, and each of these must be intrusted with considerable discretion, not only in managing business, but also in choosing their inferiors in position. It is incumbent on the principal, whether individual or company, to have safe rules of business, and to use care in selecting such agents as are immediately appointed. It is also a duty to remove such persons or to change such regulations as they have reason to believe unfit. But, until informed to the contrary, they have a right to trust that an agent or officer carefully chosen will use good judgment in making his own appointments and doing his own duties; and they have a right to rest upon that belief until, in the exercise of that general vigilance which devolves upon themselves, they find they have been mistaken. And as all men are liable to errors, no one can be bound to treat an agent as incompetent, unless for some error or misconduct going to his general unfitness for his place."

² Shanny v. Androscoggin Mills, 66 Me. 420. But it has been ruled in New York that the same care is not required in the keeping of servants as

shown to have existed at the time of employment, a *prima facie* case of negligence is made out against the master, and the burden is upon him to disprove negligence.¹ The mere fact that a railroad engineer is near-sighted does not prove him to be an improper person for the duty,² or that a brakeman was slow and lazy.³ The fact that a servant was intoxicated at the time of the happening of an accident, whereby a fellow-servant was injured, is a circumstance to be considered on the question of whether the master was in fault for employing an incompetent servant.⁴ A master is liable for injury to a servant by the negligence of a fellow-servant hired by him in entire ignorance of his qualifications, and without inquiry in reference thereto.⁵ A corporation is liable to a servant for personal injuries resulting from the negligence of an employee in selecting fellow-servants, however competent such employee may be in the business of selecting them.⁶ Failure to employ a sufficient number of men to properly perform a work in a safe manner is negligence.⁷

ILLUSTRATIONS. — The fireman of a locomotive on defendant's railroad was killed through the alleged negligence of a switchman of the road. A prior act of neglect had been charged upon the switchman, but upon investigation, by the defendant's general agent, he was retained in his position. He had at all times appeared competent and faithful. *Held*, that no negligence could be imputed to defendants in retaining the switchman in their employ, and that, therefore, they were not liable for the death of the fireman: *Baulec v. Railroad Co.*, 59 N. Y. 356; 17 Am. Rep. 325. An employee of a railroad company was injured by one of its locomotive engines, owing to the negligence

in their selection, because it is said their fitness is presumed to continue: *Chapman v. Erie R. R. Co.*, 55 N. Y. 579. And see *Davis v. Railroad Co.*, 20 Mich. 106; 4 Am. Rep. 364; *Blake v. Railroad Co.*, 70 Me. 60; 35 Am. Rep. 297.

¹ *Crandall v. McIlrath*, 24 Minn. 127.

² *Texas etc. R. R. Co. v. Harrington*, 62 Tex. 597.

³ *Corson v. Railroad Co.*, 76 Me. 244.

⁴ *Probst v. Delamater*, 100 N. Y. 266.

⁵ *Indiana Mfg. Co. v. Millican*, 87 Ind. 87.

⁶ *Tyson v. Railroad Co.*, 61 Ala. 554.

⁷ *Johnson v. Ashland Water Co.*, 71 Wis. 553.

or incompetence of the fireman, who, against the rules of the company, had been temporarily left in charge of the engine by the engineer. The master mechanic of the company, whose duty it was to employ and discharge the engineers and firemen, knew that the engineers generally were in the habit of so leaving their engines. *Held*, that the company was liable for the injury: *Ohio etc. R. R. Co. v. Collarn*, 73 Ind. 261; 38 Am. Rep. 134. A foreman of work of a railroad company was, when hired, a fit person to discharge the duties for which he was employed, but afterwards became addicted to habits of intemperance, and while intoxicated caused a defective scaffolding to be erected, which fell, injuring the plaintiff, a workman under him. *Held*, that the master was liable: *Laning v. Railroad Co.*, 49 N. Y. 521; 10 Am. Rep. 417. A, who had never learned the carpenter's trade, and had only worked as a carpenter for twelve weeks, was employed as foreman of a gang of carpenters engaged in erecting a building. Plaintiff, one of the gang, was injured by a staging on which he was working giving way. *Held*, evidence to sustain an action against the employer: *Bunnell v. Railroad Co.*, 29 Minn. 305. A railroad engineer is wild, reckless, and careless, and is going down grade at such an improper and excessive rate of speed as to necessitate the setting of the brakes, and the setting of the brakes caused the train to oscillate, violently throwing the brakeman from the train and killing him. *Held*, that the railroad company is liable for damage for such killing if the incompetence of the engineer was so generally known that they would be held to a knowledge of it: *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240.

§ 309. Where Servant is an Infant or Minor.—A minor under twenty-one, even a child of tender years, in entering a service, assumes, like the adult servant, the risks of that service.¹ But it seems essential that the contract with the infant should be a valid one.² The mere

¹ *Brown v. Maxwell*, 6 Hill, 592; 41 Am. Dec. 771; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506; *Gartland v. Railroad Co.*, 67 Ill. 498; *King v. Boston R. R. Co.*, 9 Cush. 112; *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28; 92 Am. Dec. 282; *Ohio etc. R. R. Co. v. Hammersley*, 28 Ind. 371; *Curran v. Merchants Mfg. Co.*, 130 Mass. 374; 39 Am. Rep. 457; *Fisk v. Cent. Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22.

² In *Railroad Co. v. Miller*, 49 Tex. 322, a father recovered two thousand dollars damages for an injury which happened to his minor son while employed, without his permission, on the defendant's railroad as a brakeman. The following instruction to the jury was held correct: "When a person or corporation employs a minor, it devolves on such employer to obtain the consent of the father, when such minor is under the control of the father, and whilst said minor forms a

employment, or the employment about dangerous work, of a minor by a railroad company, without the consent of his father, is not in itself negligence.¹ But it has been held an act of negligence on the part of a railroad company to take into its employment as a brakeman a minor of such tender years as not to know the risks of the service.²

The law makes it the duty of the master to explain the hazards of the service to the minor, and to make him fully alive to the dangers of the situation.³ But he is not bound to point out patent dangers;⁴ for example, as to the use, by a servant fourteen years old, of a freight elevator into the well of which opened a series of doors, one on each story.⁵ And if the master, or his foreman or vice-principal, sends a minor to perform a dangerous service outside his regular duties, the master will be liable if he is injured in performing it.⁶ In the absence of clear

part of the father's family. Whilst a minor, the father is liable for the support of his child, and is entitled to the earnings of his son; and where the son, through the negligence of the employer or its servants, receives an injury incapacitating him for a while from labor, and rendering him less serviceable up to his arriving at the age of twenty-one years, the employer thus engaging a minor, without the knowledge or consent of the father, is liable to the father in damages." And see *Hamilton v. Railroad Co.*, 54 Tex. 556. But a contract with an infant, for his benefit, is valid until avoided by the parent or guardian, and contracts of service are frequently so made: *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506; *Gartland v. R. R. Co.*, 67 Ill. 498.

¹ *Texas and Pacific R. R. Co. v. Carlton*, 60 Tex. 397; *Pennsylvania R. R. Co. v. Long*, 94 Ind. 250.

² *Goff v. Railroad Co.*, 36 Fed. Rep. 299.

³ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 507; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Grizzle v. Frost*, 3 Fost. & F. 622; *Hill v. Gust*, 55 Ind. 45; *St. Louis etc. R. R. Co. v. Valirius*, 56 Ind. 511; *Dowling v. Allen*, 74 Mo. 13; 41 Am.

Rep. 298; *F' k v. Cent. Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22. A boy of nineteen, employed in the upper story of a factory, from which the means of escape are insufficient in case of fire, is not presumed, as matter of law, to have assumed the risk. Whether he has done so is a question of fact: *Schwandner v. Birge*, 33 Hun, 186. The master is bound to use more care in the case of an infant servant: *Robertson v. Cornelson*, 34 Fed. Rep. 716.

⁴ *Fones v. Phillips*, 39 Ark. 17; 43 Am. Rep. 265; *Rock v. Indian Orchard Mills*, 142 Mass. 522; *Gilbert v. Guild*, 144 Mass. 601; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; 4 Am. St. Rep. 307.

⁵ *Costello v. Judson*, 21 Hun, 396.

⁶ *Railroad Co. v. Fort*, 17 Wall. 553; *Siegel v. Schantz*, 100 Mich. & C. 353; *Grizzle v. Frost*, 3 Fost. & F. 622; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92; *contra*, *Anderson v. Morrison*, 22 Minn. 274. In an Indiana case, the court went further, and held that where an infant servant is ordered by a fellow-servant to perform a work outside of his duties, and is injured, the master is liable: *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28; 92 Am. Dec. 282.

proof to the contrary, an infant of the age of fourteen years will be presumed to have sufficient capacity to recognize and avoid danger.¹

ILLUSTRATIONS.—A boy of fifteen, employed to feed a defective press, was injured by placing his fingers under the punch, as was habitually done, notwithstanding a rule forbidding it, nor could the work well be done without disregarding the rule. *Held*, that the employer was liable: *Hayes v. Bush and Denslow Mfg. Co.*, 41 Hun, 407. A boy of thirteen, employed by a cotton manufacturing company, caught his hand in a winder. *Held*, that a mere neglect to fence the winder was not negligence, a winder not being a peculiarly dangerous machine; that if the boy had been sufficiently instructed concerning the danger, the company's duty towards him had been performed: *Rock v. Indian Orchard Mills*, 142 Mass. 522. The plaintiff, a girl fifteen years old, was employed in the defendant's factory, and was kept at work until three o'clock Sunday mornings, and was then, by order of the superintendent, allowed to remain in the factory till daylight, but only in a basement room. On the occasion in question the night-overseer of the factory, finding the basement room damp, put the plaintiff, with other children operatives, in a second-story lighted room, which had an unguarded elevator hole in an adjoining unlighted passage-way. The children played at hide-and-seek, and the plaintiff, running into the passage-way, fell through the hole and was injured. *Held*, that the defendant was liable: *Atlanta Cotton Factory Co. v. Spear*, 69 Ga. 137; 47 Am. Rep. 750. A girl of eleven, under an agreement between her father and A, worked for A at his house. He permitted her to go across a prairie so insufficiently clad that she froze. *Held*, that she could maintain an action against A: *Nelson v. Johansen*, 18 Neb. 180; 53 Am. Rep. 806. A girl of fourteen, employed to feed collars in an ironing machine, was not instructed as to the obvious danger. After six weeks, she caught her finger in a button-hole, and her hand was drawn between the rollers. *Held*, that her employer was not liable: *Hickey v. Taaffe*, 105 N. Y. 26.

§ 310. Statutory Provisions as to Liability of Master to Servant.—By statute in some of the states as well as in England, the liability at common law of a master for injuries to his servants has been somewhat altered. By the California Code,² "an employer is not bound to indemnify

¹ *Nagle v. Railroad Co.*, 88 Pa. St. 35; 32 Am. Rep. 413. ² Civ. Code, sec. 1970.

his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer, in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." This statute has been construed so as to make no difference whether the culpable employee was in a superior grade of service to the injured employee, or not.¹ By the Georgia code it is provided: "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees, as to passengers, for injuries arising from the want of such care and diligence."² "The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business. The exception in the case of railroads has been previously stated."³ "A railroad company shall be liable for any damages done to persons, stock, or other property, by the running of the locomotives or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."⁴ "If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."⁵ These provisions change the common-law rule, and permit any employee who is free from fault

¹ Collier v. Steinhart, 51 Cal. 116;
McLean v. Blue Point Gravel Co., 51
Cal. 255.

² Ga. Code 1873, sec. 2083.

³ Ga. Code 1873, sec. 2202.

⁴ Id., sec. 3033.

⁵ Id., sec. 3036.

to recover for the negligence of any other employee, without respect to whether the two were engaged about the same business, or not.' By statute in Illinois, the owners of coal mines are required to take certain precautions for the safety of their workmen, and their neglect to do so renders them liable to a servant injured.² By the code of Iowa it is provided: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding."³ To make the master liable under this statute, the culpable servant must have failed to use ordinary, not extraordinary, care.⁴ Under this statute, an employee riding on a hand-car, but injured by another hand-car running into his, has been held entitled to recover,⁵ and so has a servant who stepped on the track to avoid a runaway team, and was injured by a hand-car negligently run by fellow-servants of his.⁶ Where, in an action for negligence, it appeared that plaintiff was a section-hand, and at the time of the injury was loading a car, it was held that his service did not pertain to the operation of the road under section 1307 of that code, permitting recovery for negligence of a co-employee only in such a case.⁷ An employee of a railway company,

¹ Georgia R. R. Co. v. Goodwire, 56 Ga. 196; Marsh v. South Carolina R. R. Co., 56 Ga. 274; Georgia R. R. Co. v. Rhodes, 56 Ga. 645.

² Underwood's Ill. Stats. 1878, pp. 867, 871, secs. 8, 14; Hurd's Ill. Stats. 1877, pp. 669, 671, secs. 8, 14.

³ Iowa Code 1873, sec. 1307.

⁴ Hunt v. Chicago etc. R. R. Co., 26 Iowa, 363.

⁵ Lombard v. Railroad Co., 47 Iowa, 494; Hoben v. Railroad Co., 20 Iowa, 562.

⁶ Moore v. Railroad Co., 47 Iowa, 688.

⁷ Smith v. Railroad Co., 59 Iowa, 73.

engaged in the work of repairing the track, is within the statute as thus limited, and entitled to recover damages of the company for the negligence of a co-employee.¹ A running of special trains over a railway by a construction company, while engaged in building it, is "operating a railway," within the statute; and a person engaged in shoveling gravel from the cars of such a train is within the constitutional scope of the statute.² A person employed by a railway company at the work of taking down and removing a bridge, who was compelled by orders of his superior to go upon one of the company's trains, and while so riding was injured, was engaged in operating the road, within the statute, and was entitled to damages.³ But a person engaged at work in the repair-shop of a railway company is not within the statute, and if he can maintain an action at all for an injury received while thus engaged, it must be under the principles of the common law.⁴ Whether the nature of the service in which the injured servant was engaged brought him within the statute has been held a question of fact for the jury, and not of law for the court.⁵ Contributory negligence of the injured employee is a bar to his action, as at common law.⁶ In Kentucky, by statute, "if the life of any person is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and re-

¹ *Frandsen v. Railroad Co.*, 36 Iowa, 372.

² *McKnight v. Construction Co.*, 43 Iowa, 406.

³ *Schröder v. Chicago etc. R. R. Co.*, 47 Iowa, 375, 383; 41 Iowa, 344.

⁴ *Potter v. Chicago etc. R. R. Co.*, 46 Iowa, 399.

⁵ *Schröder v. Chicago etc. R. R. Co.*, 41 Iowa, 344.

⁶ *McAnnich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *Hoben v. Burlington etc. R. R. Co.*, 20 Iowa, 562; *Hamilton v. Des Moines etc. R. R. Co.*, 36 Iowa, 31; *Carlin v. Chicago etc. R. R. Co.*, 37 Iowa, 316; *Lang v. Holiday Creek R. R. Co.*, 42 Iowa, 677; *Steele v. Iowa Central R. R. Co.*, 43 Iowa, 109; *Lombard v. Chicago etc. R. R. Co.*, 47 Iowa, 404.

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cover punitive damages for the loss or destruction of the life aforesaid."¹ Under this statute, it is held that if the person killed was an employee of a railroad company, and not a stranger to it, in order to a recovery the misconduct of the company or its agents or servants must have been so gross as to imply actual malice, or recklessness.² But if the person killed was a stranger to the railroad company, then, under another section of the same statute,³ whilst *punitive* damages cannot be recovered unless the jury should find that the company, its agents or servants, had been guilty of willful neglect, yet there can be a recovery of *compensatory damages* if the killing was the result of want of ordinary care on the part of the defendant.⁴ When the grade of negligence denominated "willful neglect" is established, the master must pay damages, no matter how negligently the person killed may have acted.⁵ A Maine statute enacting that every railroad corporation shall be liable for injuries sustained by "any person" under certain circumstances has been construed to mean persons not servants of the corporation, and hence not to change the common-law rule as to injuries by a fellow-servant.⁶ And a similar statute in Missouri⁷ has received a similar construction.⁸ The New York Laws, 1876, chapter 122, make it a misdemeanor to use a child in a dangerous employment. An action against the employer may be maintained by a child thus injured, and ordinarily it is for the jury to say whether the employment

¹ Stanton's Rev. Stat. Ky. 510, sec. 3.

² Claxton v. Railroad Co., 13 Bush, 636; Jacobs v. Railroad Co., 10 Bush, 263.

³ Stanton's Rev. Stat. Ky. 510, sec. 1.

⁴ Jacobs v. Louisville etc. R. R. Co., 10 Bush, 263; Claxton v. Lexington etc. R. R. Co., 13 Bush, 636.

⁵ Claxton v. Lexington etc. R. R. Co., 13 Bush, 636; Louisville etc. R. R. Co. v. Mahony, 7 Bush, 235, 239; Digby v. Kenton Iron Co., 8 Bush, 167; Jacobs v. Louisville etc. R. R.

Co., 10 Bush, 263. But see Sullivan v. Railroad Co., 9 Bush, 81.

⁶ Rev. Stats. Me. 1840, c. 81, sec. 21; Carle v. Bangor etc. R. R. Co., 43 Me. 269.

⁷ Rev. Stats. 1855, p. 647; Gen. Stats. 1865, p. 601; Wagner's Stats. 519; Rev. Stats. 1879, secs. 2121, 2122.

⁸ Proctor v. Hannibal etc. R. R. Co., 64 Mo. 112; overruling Schultz v. Railroad Co., 36 Mo. 13, and Connor v. Railroad Co., 59 Mo. 235.

was dangerous.¹ In Wisconsin, a statute making a railroad company failing to fence liable to "persons" injured may be availed of by an employee of the company.² A hammer used for driving spikes into cross-ties on a railroad is not machinery within the Alabama code providing that an employer is liable for injuries to an employee as if he were a stranger, when the injury is caused by any defect in the machinery used in the business of the master or employer.³

§ 311. Servant Waives Defect by Entering or Remaining in Service Knowing of It.—If the servant before he enters the service knows, or if he afterwards discovers, or if by the exercise of ordinary observation or reasonable skill and diligence in his department of service he may discover, that the building, premises, machine, appliance, or fellow-servant in connection with which or with whom he is to labor is unsafe or unfit in any particular, or that the occupation he is entering is a dangerous one, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him.⁴ Where an em-

¹ Hickey v. Taaffe, 32 Hun, 7.

² Quackenbush v. Railroad Co., 62 Wis. 411.

³ Georgia Pac. R'y Co. v. Brooks, 84 Ala. 138.

⁴ 2 Thompson on Negligence, p. 1008, citing and grouping the following decisions: British: Assop v. Yates, 2 Hurl. & N. 767; Griffiths v. Gidlow, 3 Hurl. & N. 648; Skipp v. Eastern Counties R. R. Co., 9 Ex. 223; 3 L. J. Ex. 23; Woodley v. Metropolitan R. R. Co., 2 Ex. Div. 384; Ogden v. Rummens, 3 Fost. & F. 751. Compare Seymour v. Maddox, 16 Q. B. 326; Dynen v. Leach, 26 L. J. Ex. 221; contra, Britton v. Great Western Cotton Co., L. R. 7 Ex. 130; Clarke

v. Holmes, 7 Hurl. & N. 937. United States: Kielley v. Belcher etc. Mining Co., 3 Saw. 500; Dillon v. Union Pacific R. R. Co., 3 Dill. 319; Jones v. Yeager, 2 Dill. 64. Connecticut: Hayden v. Smithville Mfg. Co., 29 Conn. 548. Georgia: Western etc. R. R. Co. v. Bishop, 50 Ga. 465; Johnson v. Western etc. R. R. Co., 55 Ga. 133; Georgia R. R. Co. v. Kenney, 58 Ga. 485. Compare Central R. R. Co. v. Kelley, 58 Ga. 107. Iowa: Lumley v. Caswell, 47 Iowa, 159; 7 Rep. 559. Illinois: Chicago etc. R. R. Co. v. Jackson, 55 Ill. 492; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; St. Louis etc. R. R. Co. v. Britz, 72 Ill. 256; Chicago etc. R. R. Co. v. Munroe, 85 Ill. 25; Morris v.

ployee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure.¹ One whose employment in a railroad yard requires him to move damaged cars takes the risks incident to mistaking a damaged car for a sound one,² likewise the risk arising from the use of worn rails for side-tracks in a railroad yard.³ A brakeman cannot recover for being struck by a snow-bank left along the sides of the track by the snow-plow, as he assumes such risks.⁴ One who works on a raised platform without a railing

Gleason, 1 Bradw. 510; Toledo etc. R. R. Co. v. Asbury, 84 Ill. 429; Chicago etc. R. R. Co. v. Ward, 61 Ill. 130; Indianapolis etc. R. R. Co. v. Flanigan, 77 Ill. 365; Moss v. Johnson, 22 Ill. 633. Kentucky: Sullivan v. Louisville B. Co., 9 Bush. 81. Massachusetts: Ladd v. New Bedford R. R. Co., 119 Mass. 412. Maine: Buzzell v. Laconia Mfg. Co., 48 Me. 113; 77 Am. Dec. 212. Maryland: Baltimore etc. R. R. Co. v. Woodruff, 4 Md. 242; 39 Am. Dec. 72; Hanrathy v. Northern etc. R. R. Co., 46 Md. 280. Minnesota: Le Claire v. First Division etc. R. R. Co., 20 Minn. 9. Michigan: Davis v. Detroit etc. R. R. Co., 20 Mich. 105; 4 Am. Dec. 364; Fort Wayne etc. R. R. Co. v. Gildersleeve, 33 Mich. 133. Missouri: Dale v. St. Louis etc. R. R. Co., 63 Mo. 465; Devitt v. Pacific R. R., 50 Mo. 302. North Carolina: Crutchfield v. Richmond etc. R. R. Co., 78 N. C. 300; 76 N. C. 320. New York: DeGraff v. New York etc. R. R. Co., 3 Thomp. & C. 255; reversed, 19 Alb. L. J. 134; Laning v. New York etc. R. R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Gibson v. Erie R. R. Co., 63 N. Y. 449; 20 Am. Rep. 552; reversing 5 Hun, 39; Haskin v. New York etc. R. R. Co., 65 Barb. 129; affirmed 56 N. Y. 608; Wright v. New York etc. R. R. Co., 25 N. Y. 562; Jones v. Roach, 9 Jones & S. 248. Pennsylvania: Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104; 80 Am. Dec. 467; and see O'Donnell v. Railroad Co., 59 Pa. St. 239; 98 Am. Dec. 336. Rhode Island: Kelley v. Silver

Springs etc. Co., 12 R. I. 112; 34 Am. Rep. 615. Texas: Robinson v. Houston etc. R. R. Co., 46 Tex. 540; International R. R. Co. v. Doyle, 49 Tex. 190. Wisconsin: Dorsey v. Phillips etc. Co., 42 Wis. 583; Oak Bridge Coal Co. v. Reed, 6 Cent. L. J. 275; Wormell v. Maine Cent. R. R. Co., 79 Me. 397; 1 Am. St. Rep. 321; Smith v. Car Works, 60 Mich. 591; 1 Am. St. Rep. 542; and see Greenleaf v. R. R. Co., 29 Iowa, 14; 4 Am. Rep. 181; Money v. Coal Co., 55 Iowa, 671; Naylor v. Chicago etc. R. R. Co., 53 Wis. 661; Clark v. Railroad Co., 28 Minn. 128; Chicago etc. R. R. Co. v. Clark, 11 Ill. App. 104; Chicago etc. R. R. Co. v. Simmons, 11 Ill. App. 147; Louisville etc. R. R. Co. v. Gower, 85 Tenn. 465; Spiva v. Osage Coal Co., 88 Mo. 68; Brown v. Railroad Co., 69 Iowa, 161; Herriman v. R. R. Co., 27 Mo. App. 435; Knoxville Iron Co. v. Smith, 86 Tenn. 45; Norfolk etc. R. R. Co. v. Emmert, 83 Va. 640; Boher v. Haveymeyer, 46 Hun, 557; Norfolk etc. R. R. Co. v. Cottrell, 83 Va. 512; Woodward v. Shrumph, 120 Pa. St. 458; Wilson v. R. R. Co., 37 Minn. 326; Anderson v. Sowle Elevator Co., 37 Minn. 539; Hudson v. Ocean S. S. Co., 110 N. Y. 625; New York etc. R. R. Co. v. Lyons, 119 Pa. St. 324.

¹ Unback v. R. R. Co., 83 Ind. 191.

² Fraker v. R. R. Co., 32 Minn. 54.

³ Michigan Central R. R. Co. v. Austin, 40 Mich. 247.

⁴ Dowell v. Railway Co., 62 Iowa, 629.

takes the risk of falling off.¹ A servant does not necessarily assume the risks incident to the use of unsafe machinery furnished by his master, because he knows its character and condition; it is also necessary that he should know, or by the exercise of common observation might have known, the risks attending its use.² A workman in a mine does not assume risks incident to defects in the hoisting apparatus used for lowering him to the place where he works. This is not machinery about which he is employed.³

ILLUSTRATIONS.—The plaintiff was employed to work on a machine of an old pattern, which had not all the safeguards of newer machines. He worked on it for several years, and then told the owner's superintendent that it ought to have an additional safeguard. The superintendent promised to attend to it, but it was not furnished, and the plaintiff was required to continue to work with it, under threat of being discharged if he refused. He complied, and was injured. *Held*, that the master was not liable: *Sweeney v. Berlin and Jones Envelope Co.*, 101 N. Y. 520; 54 Am. Rep. 722. A railroad switchman had been sent by the defendants to switch a car owned by another railroad company, to be loaded with nitro-glycerine by the consignor of that company. Owing to the negligence of the servants of that consignor there was an explosion, by which the switchman was killed. The switchman knew the dangerous character of the work. *Held*, that defendant was not liable: *Foley v. Railroad Co.*, 48 Mich. 622; 42 Am. Rep. 481. A brakeman in the service of a railroad company was injured by catching his foot in the guard of a switch. The guard was made of T rail, the kind in general use, and it appeared that U rail would have been safer, although not in general use. The brakeman knew the character of the rail, and continued in the service without objection. *Held*, that the railroad company was not responsible in damages: *Smith v. Railroad Co.*, 69 Mo. 32; 33 Am. Rep. 484. A conductor on defendant's railroad was knocked from a freight train and killed by a projecting roof of defendant's depot. He was familiar with the road, had passed over it daily for a long time, and the roof had not been altered after he entered the defendant's employ. *Held*, that the company was not liable: *Gibson v. Railroad Co.*, 63 N. Y. 449;

¹ *Moulton v. Gage*, 138 Mass. 390.

² *Russell v. R. R. Co.*, 32 Minn. 230.

³ *Moran v. Harris*, 63 Iowa, 390.

20 Am. Rep. 552. A locomotive engineer, in the employ of a railroad company, while leaning outside an engine in motion, and looking back for a signal from the conductor, was injured by his head coming in contact with a signal post three feet eight inches distant from the track, and visible half a mile away. There were many other signal posts and other erections along the track at the same distance from it. He knew of those facts, but had not noticed this particular post. *Held*, that he was not entitled to recover against the railroad company for the injury, as he knew the danger and assumed the risk: *Lovejoy v. Railroad Co.*, 125 Mass. 79; 28 Am. Rep. 206. A car-coupler or switchman was constantly employed in running damaged cars to the shop for repairs. While attempting to couple two of these cars he was killed. *Held*, that he had accepted the service and its risks, and could not recover: *Chicago etc. R. R. Co. v. Ward*, 61 Ill. 130. A fireman was killed by the overturning of an engine engaged in "bucking" snow. *Held*, in the suit of his representatives against the company, that a verdict for defendant was properly directed: *Bryant v. Railroad Co.*, 65 Iowa, 305; 55 Am. Rep. 275. A workman in a railroad yard caught his foot between the main rail and the guard rail at a crossing. He knew that there were no blocks. *Held*, that the risk was one which he assumed, and that for his injury the company was not liable: *Hass v. Railroad Co.*, 40 Hun, 145. An employee of a railroad, while on top of a freight-train, was caught by a telegraph wire about four feet above the top of the train, and was killed. The wire had been there for five weeks. The employee was well aware of its position, had frequently passed under it, and was an experienced hand. *Held*, that there was no evidence of negligence on the part of the management of the railroad which should be submitted to a jury: *Dalton v. Atlantic, Mississippi, etc. R. R. Co.*, 4 Hughes, 180. A railroad corporation was in the habit of running special trains without notice. An employee knowing this, while on a hand-car, was run into and injured by a special train going at a high rate of speed without notice. *Held*, that he had no right of action against the corporation: *Pennsylvania R. R. Co. v. Wachter*, 60 Md. 395. A workman was employed by a railroad company to stand in a dangerous place to signal trains. *Held*, that he assumed the obvious risks of the position: *Kennedy v. Railroad Co.*, 33 Hun, 457. A railroad track in a yard curved so sharply as to be dangerous to one attempting to make a coupling from the inner side. *Held*, that the risk was incident to the employment, and that a brakeman killed there must be deemed to have assumed the risk: *Tuttle v. Detroit, Grand Haven, etc. R'y Co.*, 122 U. S. 189. A workman engaged

in excavating a tunnel was injured by a land slide, the danger from which was apparent to him. *Held*, that he could not recover of his employer, although he was ordered to work there by a foreman, who also knew of the danger: *Anderson v. Winston*, 31 Fed. Rep. 528. A fireman knowing the danger lets on steam when there is water in the pipes, and is injured by the bursting of a valve in which there is no defect. *Held*, an injury arising from the risks of his employment: *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206. The engineer of a train was killed in an accident caused by a misplaced switch. It appeared that the switch-target was painted green, and the plaintiff contended that if it had been red it could have been more readily seen at a distance, and enabled intestate to stop his train in time. *Held*, that as all the switch-targets on the road were green, and had been for two years, during which time intestate had been in the employ of the company, he was presumed to have accepted it as one of the risks of the employment: *Naylor v. N. Y. Cent. R. R. Co.*, 33 Fed. Rep. 801. One employed as switchman in a freight-yard, while coupling cars, stepped into one of several drainage sluices which were in existence when he entered the employment, and which he knew remained without alteration, and was killed. *Held*, that the company's receiver was not liable: *De Forest v. Jewett*, 88 N. Y. 264.

§ 312. Aliter where He Complains and Master Promises to Remedy Defect.—As stated in the last section, the servant, by continuing in the service after knowledge of defects, is deemed to assume the risk himself.¹ But if the servant complain of the defect to the master, and the latter promises to remedy or repair it, the servant, by remaining on this assurance for a reasonable time in the service, will not be considered to have waived it, and the question of a reasonable time will be for the jury.² But if the defect

¹ *Kroy v. Chicago etc. R. R. Co.*, 32 Iowa, 357; *Greenleaf v. Dubuque etc. R. R. Co.*, 33 Iowa, 52; *Muldorney v. Illinois etc. R. R. Co.*, 39 Iowa, 615; *Way v. Illinois etc. R. R. Co.*, 40 Iowa, 341; *Lumley v. Caswell*, 47 Iowa, 159; 7 Rep. 559; *Crutchfield v. Richmond etc. R. R. Co.*, 78 N. C. 300; *Jones v. Roach*, 9 Jones & S. 248; *Morris v. Gleason*, 4 Ill. App. 395.

² *Belair v. Railroad Co.*, 43 Iowa, 662; *Crutchfield v. Railroad Co.*, 78

N. C. 300; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Laning v. New York etc. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Holmes v. Worthington*, 2 Fost. & F. 533; *Holmes v. Clarke*, 6 Hurl. & N. 349; 30 L. J. Ex. 135; affirmed in Exchequer Chamber, *sub nom.* *Clarke v. Holmes*, 7 Hurl. & N. 937; *Conroy v. Vulcan Iron Works*, 62 Mo. 35, 39; *Paterson v. Wallace*, 1 Macq. 748; 1 Pat. App. 389; 20 Scot. Jur. 550; *Kelley v. Silver Spring etc. Co.*, 12 R. I. 112; 34 Am. Rep.

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is not remedied within the promised time, his remaining in the service is at his own risk.¹ And when a master has furnished implements perfect of their kind, but not designed for or adapted to the performance of his work, and a servant objects to using them on this account, but continues to use them, he will be held to have assumed the risk.² And the mere complaint of the servant will not be sufficient, unless the master expressly or impliedly promises to repair the defect.³ In some jurisdictions it is even held that although the servant may have been aware of the defect, yet if it was of such a nature that a man of ordinary prudence would not on account of it have abandoned the service, and the servant continued therein, and was in consequence of the defect injured, he may recover damages.⁴

ILLUSTRATIONS.—A railroad employee in passing over the track had observed that it was rough and uneven. *Held*, not an assumption of the risk: *Dale v. St. Louis etc. R. R. Co.*, 63 Mo. 455; *Dorsey v. Railroad Co.*, 42 Wis. 583. The deceased, a miner, complained to the manager of a mine of a dangerous

615; *Patterson v. Railroad Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; 47 Am. Rep. 425; *Greene v. Railroad Co.*, 31 Minn. 248; 47 Am. Rep. 785; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; 48 Am. Rep. 669; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102; *Parody v. Railroad Co.*, 15 Fed. Rep. 205; *Counsell v. Hall*, 145 Mass. 468. In *Holmes v. Worthington*, 2 Fost. & F. 533, Mr. Justice Willes said: "There is no case deciding that where the employer and the servant are both aware that the machinery is in an unsafe state, and the servant goes on using it under a reasonable belief that it will be set right by the employer, and it is not set right, and he suffers an injury, he cannot sustain an action. The master may choose to be too chary of repairs for the sake of economy. No doubt if, knowing this, the servant chooses to use the machine, he may lose his remedy, just as in the case of the man taking employ-

ment at a gunpowder factory. . . . If the defendants knew of the defect, and undertook to repair it, and the plaintiff went on working, relying on their repairing it, then they may be liable. If the plaintiff complained of the defect, and the defendants promised that it should be remedied, he is not to be deprived of his remedy merely because, relying on their promise, he remained in their employment."

¹ *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152.

² *Texas etc. R. R. Co. v. Bradford*, 66 Tex. 732; 59 Am. Rep. 639.

³ *Railroad v. Drew*, 59 Tex. 10; 46 Am. Rep. 261.

⁴ *Snow v. Railroad Co.*, 8 Allen, 441; 85 Am. Dec. 720; *Patterson v. Railroad Co.*, 76 Pa. St. 389; 18 Am. Rep. 413; *Colorado R. R. Co. v. Ogden*, 3 Col. 490; *Buzzell v. Mfg. Co.*, 48 Mo. 113; 77 Am. Dec. 212; *Britton v. Cotton Co.*, L. R. 7 Ex. 130; *Clarke v. Holmes*, 7 Hurl. & N. 937.

stone in the roof of the mine, and he promised to remove it. The foreman sent men to remove it, and the deceased went to work below, instead of waiting till it was removed. The workmen accidentally detached the stone, and it fell on the deceased, killing him. *Held*, that the deceased had not waived the defect: *Patterson v. Wallace*, 1 Macq. 648. An employee of a railroad company complained to the yard-master that the work on which he was engaged was unsafe, because enough hands were not furnished to perform it. No promise to furnish more was given. The employee continued in the service and was injured. *Held*, that he was not negligent as matter of law: *Thorpe v. Railroad Co.*, 89 Mo. 650; 58 Am. Rep. 120.

§ 313. Contributory Negligence of Servant—Failing to Notify Master of Defect.—If the servant continues in the use of the particular machine, tool, or appliance, or to work in the particular building, on the particular premises, or in connection with the particular fellow-servant, after he has discovered that it is dangerous for him to do so, without informing his master of the danger, he is guilty of contributory negligence, such as will preclude him from recovering damages of the master in case he is afterwards injured thereby.¹ He must either make

¹ 2 Thompson on Negligence, sec. 19, p. 1014; *Greenleaf v. Dubuque etc. R. R. Co.*, 33 Iowa, 52, 57; *Cratchfield v. Richmond etc. R. R. Co.*, 78 N. C. 300; 76 N. C. 320; *Timmons v. Central Ohio R. R. Co.*, 6 Ohio St. 105; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212; *Catawissa R. R. Co. v. Armstrong*, 49 Pa. St. 186; *Mansfield Coal Co. v. McEnery*, 91 Pa. St. 185; 36 Am. Rep. 662; *Pennsylvania Co. v. Lynch*, 90 Ill. 333. In *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312, the court say: "The duty imposed on the company by the relation occupied by the conductor was to use reasonable and ordinary care and diligence in furnishing him with sufficient sound and safe cars and machinery for the train. This duty required not only that the company should use proper skill and diligence in procuring and furnishing sufficient and safe cars and machinery, but also, when notified

that they had become insufficient and unsafe, or when they had been in use as long as they could with safety be used, to take them off the road until repaired and made sufficient and safe. And for any injury sustained by an agent or employee of the company from any neglect of this duty, the company would be liable. But the relation occupied by the agent or employee imposes a reciprocal duty upon him. It was the duty of Barber, as the conductor of this train, to use ordinary and reasonable skill and diligence on his part, not simply in the management of the train, but also in supervising the due inspection of the cars, machinery, and apparatus, as to their sufficiency and safety while under his charge; and on the discovery of any defect or insufficiency, to notify the company, and to take the proper precautions to guard against danger therefrom. And if he was injured by the negligence of the company in furnish-

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the necessary repairs himself, or report the fact to the employer or person having charge of the repairs, and if he omits to do so, and is injured in consequence, he cannot recover from the employer.¹ It is contributory negligence in the servant, if after discovering defects in the machinery, or incompetence in his fellow-servants, not to notify the master of the fact;² unless, it seems, where the master has equal knowledge of the defect with the servant.³ But the servant is not negligent *per se* for using defective machinery, even with knowledge of defects, if the danger is not immediate.⁴

§ 314. Going into Dangerous Situation by Command of Master.—Where the master orders the servant into a

ing or continuing to use defective cars and machinery, yet if his own neglect of duty in the management of the train, or due inspection of the cars and machinery in his charge, contributed as a proximate cause of the injury, he could have no right of action against the company for damages; or if he knew of the defects and insufficiency of the cars or machinery, and without taking the necessary and proper precaution to guard against danger, continued to use them, he took upon himself the risk, and waived his right as against the company. If there was no neglect of due and ordinary care and diligence on the part of the company furnishing or continuing the use of the cars and machinery, and the injury was caused by latent defects, unknown alike to the company and to the conductor, and not discoverable by due and ordinary skill and diligence in the inspection of the cars and machinery, it would be a misadventure, falling among the casualties incident to the business, and for which no one could be blamed. But if the defects which caused the injury were actually unknown, either to the company or the conductor, and not discoverable by due and ordinary inspection, and yet were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring

the cars or machinery to be made, or in continuing their use on the road beyond the time when they could be safely used, the company would be liable in damages for the injury. And whether such was the case or not was a matter of fact for submission, under proper instructions, to the jury in the court below."

¹ *Stroble v. Railroad Co.*, 70 Iowa, 555; 59 Am. Rep. 456.

² *Illinois etc. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240; *Toledo etc. R. R. Co. v. Eddy*, 72 Ill. 138; *Crutchfield v. Richmond etc. R. R. Co.*, 76 N. C. 320; 78 N. C. 300; *Patterson v. Railroad Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *McMillan v. Railroad Co.*, 20 Barb. 449; *Davis v. Railroad Co.*, 20 Mich. 105; 4 Am. Rep. 364; *Allerton Packing Co. v. Egan*, 86 Ill. 253; *Porter v. Railroad Co.*, 97 N. C. 66; 2 Am. St. Rep. 272. If a servant knows that the tools given him by his master to work with are defective, he cannot recover for an injury caused by the defect: *Texas and Pacific R'y Co. v. Bradford*, 66 Tex. 732; 59 Am. Rep. 639; as where a section-master used a defective dump-car after he had been ordered to get another: *Pleasants v. Raleigh and Augusta Air-line R. R. Co.*, 95 N. C. 195.

³ *Fairbank v. Haentzsch*, 73 Ill. 236; *Perry v. Ricketts*, 55 Ill. 234.

⁴ *Huhn v. Railroad Co.*, 92 Mo. 440.

situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose.¹ Although a master may have directed a servant, through his superintendent, to wipe off a machine while in motion, without caution as to the danger of so doing, yet if the danger is apparent, and the servant in doing so allows the waste which he is using to hang down and be caught in the cog-wheels below, this is contributory negligence.² The fact that an employee has performed work, knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he performed that which was dangerous in a negligent manner.³ So where the person injured was ordered into a service of peculiar danger, such as he did not undertake to perform, by another servant, standing toward him in the relation of superior or vice-principal, if he obeys such an order, and is injured, he may recover damages. The law will not declare his act of obedience negligence *per se*, but will leave it to the jury to say whether he ought to have obeyed or not.⁴

ILLUSTRATIONS.—The plaintiff was a laborer in the employ of a railroad company, under the control of a section foreman, engaged in spiking down rails. He was furnished with a hammer obviously and dangerously defective. He protested to the foreman against working with it, but was ordered to use it on pain of losing his place. The work in hand required speedy performance. He used the hammer, and was injured by reason

¹ Keegan v. Kavanaugh, 62 Mo. 230; Leary v. Railroad Co., 139 Mass. 580; 52 Am. Rep. 733; Jones v. Railroad Co., 49 Mich. 573; Cole v. Railroad Co., 71 Wis. 114.

² Atlas Engine Works v. Randall, 100 Ind. 293; 50 Am. Rep. 798.

³ Mobile etc. R'y Co. v. Holborn, 84 Ala. 133.

⁴ Lalor v. Chicago etc. R. R. Co., 52 Ill. 401; 4 Am. Rep. 616; Berea Stone

Co. v. Kraft, 31 Ohio St. 287; 27 Am. Rep. 510; Bradley v. New York etc. R. R. Co., 62 N. Y. 99; Mann v. Oriental Print Works, 11 R. I. 153; Chicago etc. R. R. Co. v. Bayfield, 37 Mich. 205; Patterson v. Pittsburg R. R. Co., 76 Pa. St. 389, 394; 18 Am. Rep. 412; Fort v. Whipple, 11 Hun, 586; Chicago etc. R. R. Co. v. Harney, 28 Ind. 28; 92 Am. Dec. 282.

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of its defective condition. *Held*, that the railroad company was liable: *East Tennessee etc. R. R. Co. v. Duffield*, 12 Lea, 63; 47 Am. Rep. 319. The defendant, owner and master of a steam-tug, ordered the cook to go forward and handle the bow-line, and he got entangled in it and was hurt. He was usually employed at the stern, and the employment in question was more dangerous, and the defendant did not warn him, but urged him to the duty with an oath. But the plaintiff was nineteen years old, had lived at the seashore all his life, and had been to sea three summers, and on the tug four months. *Held*, that a verdict for the defendant must stand: *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 304. The plaintiff, in the employ of a railroad company, went under a car standing alone on a repair track, by order of his foreman, to repair it, and was there injured by the starting of the car by an advancing train. The track was usually protected. There was no proof of any precautions to protect it on this occasion. *Held*, that a nonsuit was improper: *Luebke v. Railroad Co.*, 59 Wis. 127; 48 Am. Rep. 483. A servant is directed by his master to drive a van under a gateway, over which there is a sign, the master having better means of observation, and in following directions is injured by coming in contact with the sign. *Held*, that he may maintain an action against the master for such injury: *Haley v. Case*, 142 Mass. 316. A hod-carrier, engaged at work about an excavation, perceiving that it was dangerous, manifested some reluctance to descend into it, but was ordered by his employer to do so, and obeyed, and the earth caved in upon him and killed him. *Held*, that his widow might recover damages of his employer: *Keegan v. Kavanaugh*, 62 Mo. 230. Plaintiff's intestate was employed by defendant, a railroad company, as a common laborer, for the purpose of loading and unloading freight-cars. While thus engaged he was ordered by the depot superintendent to couple a freight car with other cars attached to a locomotive; and having to go between the cars for this purpose, the engine was so carelessly managed that he was crushed to death. The duty of coupling the cars was entirely different from that for which deceased was hired. *Held*, that plaintiff could recover: *Lalor v. Railroad Co.*, 52 Ill. 401; 4 Am. Rep. 616. A took service with a railroad company as a brakeman on a passenger train. After a while he was ordered to do yard-work. He objected and protested, but, rather than lose his place, complied with the order. While in the performance of the yard-work, which was of a dangerous character, he received injuries. *Held*, that the company's liability to him was greater than it would have been had he been an ordinary yard-hand, and that it was competent for him to show that he protested

against doing the work when ordered to: *Jones v. Railroad Co.*, 49 Mich. 573. A railroad engineer was ordered to use two engines coupled together for bucking snow off the track. The practice is general and well known, but dangerous. The engineer, while thus engaged, was killed. *Held*, the occupation was included in the ordinary risks of his employment: *Morse v. Railroad Co.*, 30 Minn. 465. A master ordered his servant to go on a platform, which was dangerous because sloping outwards, slippery, and unprotected, to do a piece of work. The servant knew the danger as well as the master, and might have taken some precautions against it. He took none, however, fell, and was injured. *Held*, that the master incurred no liability: *English v. Railroad Co.*, 24 Fed. Rep. 906.

§ 315. Other Cases of Contributory Negligence.—It is negligence in the servant to disobey the regulations of the master whereby he is injured,¹ provided the violation is the proximate cause of the injury;² as where a brakeman was injured by coupling cars by hand, when the rules of the company declared that "a short stick must always be used to guide the link."³ If a servant is directed to do a certain thing, and he voluntarily and negligently chooses a dangerous method of doing it, there being a safer method, his master is not liable for injuries resulting from such negligence.⁴ An engineer cannot recover against the company for injuries received in a collision with another train, where his own train, as well as the other, was out of time.⁵

ILLUSTRATIONS.—An engine was old and rickety, and liable, when fired up, to start off of its own accord; but by the observance of certain simple rules this could be prevented. A fireman, well knowing these rules, neglected them when he fired up the engine for the day's work, and while he was standing on the track, adjusting the key to the cellar-box, the engine started,

¹ *Lyon v. Railroad Co.*, 31 Mich. 429; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Memphis R. R. Co. v. Thomas*, 51 Miss. 637.

² *Ford v. Railroad Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Locke v. Sioux City R. R. Co.*, 46 Iowa, 109.

³ *Wolsey v. Railroad Co.*, 33 Ohio St. 227.

⁴ *St. Louis Bolt and Iron Co. v. Burke*, 12 Ill. App. 369.

⁵ *Georgia R. R. etc. Co. v. McDade*, 59 Ga. 73.

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injuring him. *Held*, that he was guilty of contributory negligence: *Vicksburg R. R. Co. v. Wilkins*, 47 Miss. 404. The boiler of a locomotive contained defects which were plainly visible on the outside. Notwithstanding this, the engineer continued to run the engine, keeping the steam much higher than he was instructed to do, and higher than would have been safe with a sound boiler. It exploded, and he was killed. *Held*, contributory negligence: *Hubgh v. Railroad Co.*, 6 La. Ann. 495; 54 Am. Dec. 565. A servant gropes along a dark passage-way on his master's premises where he has no business, and opens a door and falls down an elevator, which has a bar in front of it. *Held*, that he has no cause of action against his master: *Pfeiffer v. Ringler*, 12 Daly, 437. A brakeman, endeavoring to couple cars under circumstances of peculiar danger, disregarded the warning of by-standers, and was injured. *Held*, contributory negligence, preventing him from recovering damages: *Muldonney v. Railroad Co.*, 39 Iowa, 615. An experienced brakeman undertook to couple cars which he knew to be of unequal height, without using the ordinary crooked link which is used for the purpose of preventing accidents in such case. *Held*, contributory negligence, barring a recovery: *Hulett v. Railroad Co.*, 67 Mo. 239. On the defendant's railroad was a bridge with sides five feet high, coming up one foot above the floor of the engine-cab, and thirteen and a half inches from the sides of passing engines. The plaintiff's intestate, a fireman, well knowing the character and situation of the bridge, without orders and in violation of the rules, opened the ash-pan, whereby fire was communicated to woolen waste in a journal box. Then without orders or necessity he stood outside of the engine on the steps of the engine and tender and endeavored to extinguish the fire with a hose, and while so employed he was struck by the side of the bridge and killed. *Held*, that the company was not liable: *Sheeler v. Railroad Co.*, 81 Va. 188; 59 Am. Rep. 654. An engineer carried more steam than the rules of the company allowed, and suffered the water to get too low in the boiler. An explosion took place and he was killed: *Held*, contributory negligence: *Illinois etc. R. R. Co. v. Houck*, 72 Ill. 285. An engineer was running his train at a high, reckless rate of speed, in order to make up for lost time. The engine ran off the track while passing a battered rail on a curve, and he was injured. *Held*, contributory negligence: *Illinois etc. R. R. Co. v. Paterson*, 69 Ill. 650. A railroad company used on some of its cars an apparatus for coupling known as the "Miller" draw-bar, and on others an ordinary draw-bar. When it is attempted to couple a car provided with the "Miller" draw-bar with one provided with the ordinary

draw-bar, the ends are liable to slip past each other, thus bringing the platforms of the two cars near together. This, on one occasion, happened with two of the company's cars, in the presence of an experienced brakeman. Soon after, the same cars got detached from each other, and this brakeman went between them to couple them, and was crushed and killed by reason of the ends slipping past each other and the platforms coming together. *Held*, that there could be no recovery: *Toledo etc. R. R. Co. v. Ashbury*, 84 Ill. 429. A brakeman failed in his first attempt to make the coupling, and instead of stepping out from between the cars, as he might have done, continued the attempt as the cars were moving on, and while so doing, got his foot in the frog of the rails, whereby he was injured. *Held*, that although the company had failed to furnish cars which coupled readily, yet the negligence of the brakeman was the proximate cause of the injury: *Williams v. Railroad Co.*, 43 Iowa, 396. A brakeman whose duty it was to uncouple cars saw that the train did not stop to enable him to perform this duty. He nevertheless ran in between the cars while they were moving, endeavoring to uncouple them, and was killed. *Held*, contributory negligence: *Marsh v. Railroad Co.*, 56 Ga. 274. The proprietors of a factory failed to fence a shaft, which they were required to do by statute. One of their servants, contrary to their express commands, and knowing that it was dangerous to meddle with the shaft, took hold of it and set it in motion, whereby he was injured. *Held*, contributory negligence: *Caswell v. Worth*, 5 El. & B. 849. A servant of a ship-builder, knowing a bridge to be weak and defective, and that blocks had previously been placed under it to strengthen it, and that when so strengthened it had borne the weight of eighteen hundred pounds, attempted to use it without the aid of such strengthening-blocks. It broke down and he was drowned. *Held*, contributory negligence: *Jones v. Roach*, 9 Jones & S. 248. A brakeman of a gravel train, having lost his coat from the train while in motion, got off to pick it up, and attempted to board it while in motion, and in doing so caught hold of the rim of a box-car, which broke, and he fell. *Held*, contributory negligence: *Timmons v. Railroad Co.*, 6 Ohio St. 105. A railroad flagman stood on the track in front of an approaching train, and was run over. *Held*, contributory negligence: *Mills v. Railroad Co.*, 2 McAr. 314. An experienced seaman was placed to await orders in the wheel-house of a steam-barge which was being towed. He unlashed the wheel without orders, and as the rudder came into contact with an obstruction on the bottom, the wheel revolved and injured him while trying to hold it. *Held*, that he was guilty of contributory

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negligence: *The John B. Lyon*, 33 Fed. Rep. 184. A brakeman, while descending the ladder on the side of the caboose, not in the discharge of his duty, but for some purpose of his own, was struck and injured by the supply-pipe of a water-tank. He had been on the road for three months, knew of the proximity of the tank, and that there was not sufficient space for a person to pass between the pipe and the train. *Held*, that he was guilty of contributory negligence: *Wilson v. Louisville & N. R. Co.*, Ala., 1888. A brakeman, having been warned of the danger, attempted to couple cars with double dead-woods, and was injured. *Held*, that he was guilty of contributory negligence. *Hathaway v. Michigan Cent. R. R. Co.*, 51 Mich. 253; 47 Am. Rep. 569; and see *Kelly v. Abbott*, 63 Wis. 307; 53 Am. Rep. 292. A brakeman attempted to change an engine-link without having the engine stop before going on an unballasted side-track, and was injured. *Held*, contributory negligence: *Pennsylvania Co. v. Hankey*, 93 Ill. 580. A foreman of a gang of stone-cutters directed a particular stone to be taken from a large pile. This was done in such a manner as to cause the fall of another stone, by which the plaintiff, one of the gang, a person under age, had his leg broken. There was evidence tending to show negligence both on the part of the foreman and of the workmen. *Held*, contributory negligence: *Brown v. Maxwell*, 6 Hill, 592; 41 Am. Dec. 771. A laborer attempted to raise a weight by fastening an engine to it by means of a clip. The clip slipped off, the weight fell, and he was killed. *Held*, contributory negligence: *Dynen v. Leach*, 26 L. J. Ex. 221. An employee rode on the top of a car and was struck by a bridge, whose situation he well knew. *Held*, contributory negligence: *Pittsburg etc. R. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 37 Am. Rep. 684; *Clark v. Railroad Co.*, 78 Va. 709; 49 Am. Rep. 394; *Hooper v. Railroad Co.*, 21 S. C. 541; 53 Am. Rep. 691; *Owen v. Railroad Co.*, 1 Lans. 108. A brakeman was thrown from a railroad car and killed, by reason of the brake-head coming off the upright shaft, through the nut at the top being loose and coming off. *Held*, that the company was not liable, as it was the brakeman's duty to see that the brake was in good repair and in fit condition for use, and to report its defects to the company: *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240. An engineer, while leaning out of the locomotive, and looking back to get a signal from the conductor, was injured by his head coming against a signal-post, three feet and eight inches distant from the track. Before looking back he had looked ahead and seen no obstruction. He knew of the signal-posts, but had never noticed this one. There were other structures on the line of the road at the same distance from the

track. *Held*, that he could not recover of the company for the injury: *Lovejoy v. Boston etc. R. R. Co.*, 125 Mass. 79; 28 Am. Rep. 206. A workman in a mining tunnel, fully aware of the danger of an unsupported ceiling which he was fixing in his own way (confessedly a dangerous way), sat down while resting directly under the dangerous spot. The ceiling fell, and he was injured. *Held*, in an action against the employer, that the jury should be directed to find for defendant: *Bunt v. Sierra Buttes Gold Mining Co.*, 24 Fed. Rep. 847. An employee in a stove factory, in the absence and in violation of the directions of his employers, exchanged his usual and proper place of work, for which he was employed as a catcher,—a place of little or no danger,—for that of sawyer, a much more dangerous position; and while he was so acting as sawyer, a band-wheel broke, and one of the pieces struck and injured the employee. *Held*, that the employee, by going from his proper place into one of greater danger, contributed to his injury: *Brown v. Byroads*, 47 Ind. 435. An engineer in the employ of a railroad company was injured by the falling of an embankment. *Held*, that the fact that he had with him in the locomotive, at the time of the accident, another engineer, contrary to a rule of the company, would not prevent his recovering damages against the company, provided that the presence of the other engineer did not contribute to the disaster: *Central R. R. Co. v. Mitchell*, 63 Ga. 173.

§ 316. What not Contributory Negligence in Servant.

—It has been held not contributory negligence for a brakeman to attempt to pick up a coupling-pin from the track in front of a slowly moving train;¹ for section-hands to run a hand-car over a track ahead of a train past due;² for a baggage-master to jump from a moving train which is in danger of collision;³ for a locomotive engineer to stick to his post in the face of danger;⁴ for a locomotive engineer to run the engine, knowing the air-brake to be out of order.⁵

§ 317. Doctrine of "Comparative Negligence."—The doctrine of "comparative negligence" exists in a few

¹ *Steele v. Railroad Co.*, 43 Iowa, 109.

² *Campbell v. Railroad Co.*, 45 Iowa, 78.

³ *Georgia R. R. Co. v. Rhodes*, 56 Ga. 645.

⁴ *Cottrell v. Railroad Co.*, 47 Wis. 634; 32 Am. Rep. 796; *Pennsylvania Co. v. Roney*, 89 Ind. 453; 46 Am. Rep. 173.

⁵ *Flynn v. Railroad Co.*, 78 Mo. 195; 47 Am. Rep. 99.

states. The rule of "comparative negligence" is, that a comparison may be made by the jury between the negligence of the plaintiff, or the deceased, and that of the defendant; and if, in comparison with each other, the negligence of the former is slight, while that of the latter is gross, the plaintiff will be entitled to recover.¹ Under this rule, recoveries have been sustained in the following instances: Where a fireman on a railroad locomotive in motion, leaning out from the gangway or side window, on the look-out for signals, was killed by a "mail-catcher";² where a railroad company retained in its employ, as conductor of a gravel train, a person notoriously given to habits of intemperance, and by his negligence, when partly intoxicated, another employee was killed, himself negligent in sitting on the end of a flat-car with his legs hanging down;³ where the proprietors of a factory, in moving an engine, left a revolving shaft extending several feet into a room where twenty girls were at work, and one of them, while going about her work, was caught by it and killed;⁴ where several railroad section-hands, returning from their work on a hand-car, were ran upon by an engine which came suddenly round a curve at an unlawful rate of speed, although the deceased might have saved himself by jumping off the hand-car as the rest did.⁵

§ 318. **Contracts between Master and Servant as to Injuries.**—It has been held in Georgia that contracts between railroad companies and their employees, by which the latter assume all risks incident to the employment, are valid if they do not include criminal acts.⁶ But in

¹ Chicago etc. R. R. Co. v. Sullivan, 63 Ill. 293; St. Louis etc. R. R. Co. v. Britz, 72 Ill. 256; Fairbank v. Haentzsch, 73 Ill. 236; Chicago etc. R. R. Co. v. Gregory, 58 Ill. 272; Toledo etc. R. R. Co. v. O'Connor, 77 Ill. 391; Foster v. Chicago etc. R. R. Co., 84 Ill. 165; Harms v. Sullivan, 1 Bradw. 251.

² Chicago etc. R. R. Co. v. Gregory, 58 Ill. 272.

³ Chicago etc. R. R. Co. v. Sullivan, 63 Ill. 293.

⁴ Fairbank v. Haentzsch, 73 Ill. 236.

⁵ Toledo etc. R. R. Co. v. O'Connor, 77 Ill. 391.

⁶ Galloway v. Railroad Co., 57 Ga. 512; Western etc. R. R. Co. v. Bishop,

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other states it is held that such a contract, made to include negligence, is void as against public policy.¹ Contracts between the master and servant, entered into after the servant received the injury, by which a servant releases the master from the damages, are upheld as valid if founded upon a valuable consideration, and not obtained from the servant by means of misrepresentations or fraud.² The fact that an employee has been disabled while in the employ of a railroad company, and in the discharge of his hazardous duties, is a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure.³

§ 319. Who are Fellow-servants — Common Employment the Test. — "The decided weight of authority is to the effect that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence."⁴ Though servants work under different overseers, if engaged in the same line of employment, such as necessarily brings them into frequent contact with each other in the prosecution of their work, they are co-servants.⁵ The fact that the negligent servant, in his grade of employment, is superior to the servant injured does not, in the opinion of most of the courts, take

50 Ga. 465; *Western etc. R. R. Co. v. Strong*, 52 Ga. 461; *Hendricks v. Western R. R. Co.*, 52 Ga. 467; and see *Mitchell v. Railroad*, 1 Am. Law Reg. 717.

¹ *Roesner v. Hermann*, 10 Biss. 486; *Railroad Co. v. Spangle*, 44 Ohio St. 471; 58 Am. Rep. 833; *Kansas Pac. R. R. Co. v. Peavey*, 29 Kan. 169; 44 Am. Rep. 630; *Little Rock etc. R. R. Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245; *Memphis etc. R. R. Co. v. Jones*, 2 Head, 517.

² *Illinois etc. R. R. Co. v. Welch*,

52 Ill. 183; 4 Am. Rep. 593; *Schultz v. Railroad Co.*, 44 Wis. 638; *Chicago etc. R. R. Co. v. Doyle*, 18 Kan. 58.

³ *Toledo etc. R. R. Co. v. Rodriguez*, 47 Ill. 183; 95 Am. Dec. 484.

⁴ 2 Thompson on Negligence, sec. 31, p. 1026; *Wonder v. Railroad Co.*, 32 Md. 411; 3 Am. Rep. 143; *Foster v. Railroad Co.*, 14 Minn. 360; *Chicago etc. R. R. Co. v. Murphy*, 53 Ill. 336; 5 Am. Rep. 48.

⁵ *Chicago and Alton R. R. Co. v. O'Bryan*, 15 Ill. App. 134.

the case out of the rule; they are equally fellow-servants, and the master is not liable.¹ Where two servants are at work in the same employment, neither having authority over the other, the mere fact that one of them has authority to employ and discharge other servants does not change his character of fellow-servant to that of a representative of their employer.² The following have in different cases been held to be in the same common employment, and therefore "fellow-servants" with each other, viz.: A locomotive engineer and a switch-tender;³ a fireman on one engine and a substitute for a switch-tender;⁴ a brakeman and the men engaged in making up a train;⁵ a mill superintendent and a common spinner;⁶ a track-repairer and those in charge of a train upon which he rode;⁷ a brakeman of one train and the engineer of

¹ O'Connell v. Baltimore R. R. Co., 20 Md. 212; 83 Am. Dec. 549; McGowan v. St. Louis etc. R. R. Co., 61 Mo. 528; Columbus etc. R. R. Co. v. Arnold, 31 Ind. 174; 99 Am. Dec. 615; Thayer v. St. Louis etc. R. R. Co., 22 Ind. 26; 85 Am. Dec. 499; Daubert v. Pickel, 4 Mo. App. 590; Cumberland Coal and Iron Co. v. Scally, 27 Md. 589; Shauck v. Northern etc. R. R. Co., 25 Md. 462; O'Connor v. Roberts, 120 Mass. 227; Albrow v. Agawam Canal Co., 6 Cush. 75; McLean v. Blue Point M. Co., 51 Cal. 255; Faulkner v. Erie R. R. Co., 49 Barb. 324; Conway v. Belfast etc. R. R. Co., 1 R. 9 C. L. 498; Murphy v. Smith, 19 Com. B., N. S., 361; 12 L. T., N. S., 605; Allen v. New Gas Co., 1 Ex. Div. 25; Howells v. Landore Siemens Steel Co., 10 Q. B. 62; Gallagher v. Piper, 16 Com. B., N. S., 669; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Lawler v. Androscoggin R. R. Co., 62 Me. 463; 16 Am. Rep. 492; Feltham v. England, L. R. 2 Q. B. 33; reversing 4 Fost. & F. 460; Wilson v. Merry, L. R. 1 H. L. S. 326; Brown v. Maxwell, 6 Hill, 592; 41 Am. Dec. 771; Peterson v. Coal Co., 50 Iowa, 673; 32 Am. Rep. 143; Blake v. Railroad Co., 70 Me. 60; 35 Am. Rep. 297; Brown

v. Railroad Co., 27 Minn. 162; 38 Am. Rep. 285; Eagan v. Tucker, 18 Hun, 347; Delaware etc. R. R. Co. v. Carroll, 89 Pa. St. 374; Peterson v. Whitebreast Coal Co., 50 Iowa, 673; 32 Am. Rep. 143; Quincy Mining Co. v. Kitts, 42 Mich. 34; McDermott v. Boston, 133 Mass. 349; Flynn v. Salem, 134 Mass. 351; Hart v. Dry Dock Co., 48 N. Y. Sup. Ct. 460; Hoib v. Peters, 55 Wis. 405; Dwyer v. Am. Ex. Co., 55 Wis. 453; Willis v. Railroad Co., 11 Or. 257.

² Lincoln Coal Mining Co. v. McNally, 15 Ill. App. 181.

³ Farwell v. Railroad Co., 4 Met. 49; 38 Am. Dec. 339.

⁴ Tinney v. Boston etc. R. R. Co., 52 N. Y. 632.

⁵ Hodgkins v. Railroad Co., 119 Mass. 419.

⁶ Albrow v. Agawam Canal Co., 6 Cush. 75.

⁷ Gillshannon v. Stony Brook R. R. Co., 10 Cush. 228; Seaver v. Boston etc. R. R. Co., 14 Gray, 466; Gilman v. Eastern R. R. Co., 10 Allen, 233; 87 Am. Dec. 635; 13 Allen, 433; 90 Am. Dec. 210; Russell v. Hudson River R. R. Co., 17 N. Y. 134; Ohio etc. R. R. Co. v. Tindall, 13 Ind. 366; 74 Am. Dec. 259.

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another colliding with the first;¹ a locomotive engineer and a master mechanic of the railroad;² several persons engaged in a mine, some breaking down the ore with picks and by blasting, others loading and wheeling it out;³ the persons in charge of a railroad locomotive and a section-man engaged in repairing defendant's track;⁴ a laborer engaged in hoisting coal by machinery and the engineer in charge of the engine;⁵ an underground workman in a coal-pit and the engineer at the top of the pit;⁶ a licensed water-man employed by a warehouseman by the week, but whose duties only required him to attend three hours at every high tide, and the other servants of the warehouseman engaged in hoisting goods;⁷ the foreman of a shop, having charge of the machinery therein and a workman in the shop injured by a defect in the machinery;⁸ the heads of different departments in the same coal-mine working together under a common superintendent;⁹ a master of a vessel and the mate;¹⁰ an "under-looker" in a coal mine, whose duty it is to examine the roof and prop it up if dangerous, and a common laborer in a mine;¹¹ servants engaged in operating different trains on the same line or road;¹² a conductor of a "dump," or gravel train, and a common laborer thereon;¹³ a brakeman on a train and the mechanics in the repair-

¹ *Wright v. New York etc. R. R. Co.*, 25 N. Y. 562; *Randall v. Railroad Co.*, 109 U. S. 478.

² *Hard v. Vermont etc. R. R. Co.*, 32 Vt. 473.

³ *Kielley v. Belcher Silver Mining Co.*, 3 Saw. 500.

⁴ *Foster v. Minnesota etc. R. R. Co.*, 14 Minn. 360; *Coon v. Syracuse etc. R. R. Co.*, 5 N. Y. 492; *Whalan v. Mad River etc. R. R. Co.*, 8 Ohio St. 249.

⁵ *Wood v. New Bedford Coal Co.*, 121 Mass. 252.

⁶ *Bartonshill Coal Co. v. Reid and McGuire*, 3 Macq. 266, 300; 4 Jur., N. S., 767; 1 Pat. App. 785.

⁷ *Lovell v. Howell*, L. R. 1 Com. P. Div. 161; 45 L. J. 387.

⁸ *Hanrathy v. Northern etc. R. R. Co.*, 46 Md. 280; 5 Rep. 698.

⁹ *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; 6 Rep. 125; 17 Alb. L. J. 513.

¹⁰ *Halverson v. Nisen*, 3 Saw. 562.

¹¹ *Hall v. Johnson*, 3 Hurl. & C. 589; 11 Jur., N. S., 180; 34 L. J. Ex. 222; 13 Week. Rep. 411; 11 L. T., N. S., 779.

¹² *Hutchinson v. York etc. R. R. Co.*, 5 Ex. 343; 6 Eng. R. R. Cas. 680; *Louisville etc. R. R. Co. v. Robinson*, 4 Bush, 507; *Pittsburgh etc. R. R. Co. v. Devinney*, 17 Ohio St. 197.

¹³ *O'Connell v. Baltimore etc. R. R. Co.*, 20 Md. 212; 83 Am. Dec. 549.

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shops; a brakeman, and the inspector of machinery and rolling stock;¹ a conductor of a construction train and one of the laborers employed on it, in the absence of proof that the conductor was in fact a vice-principal;² a carpenter or other employee of a railroad company and the men in charge of the train by which he is carried to or from his work, in pursuance of his contract of service;³ an employee on a train going to his work and a signal-man of the company;⁴ a conductor traveling on another train to his place of service;⁵ a fireman and a master machinist of the company;⁶ an engineer, brakeman, and shoveler;⁷ a coal-miner employed by a mining company, who has been detailed, with many other miners, to work repairing a break in a railroad belonging to the company, and the conductor of a construction train on such railroad, on which train the person injured was working;⁸ a switch-tender and a locomotive engineer;⁹ a brakeman and another brakeman, together with a conductor of a freight train;¹⁰ the general traffic manager and a "milesman" employed under the orders of the "ganger";¹¹ a carpenter at work for the railroad company and the servants of the company in charge of a turn-table;¹² a conductor and a brakeman employed on the same train;¹³ a brakeman on a freight train and an engineer on a passenger train of

¹ *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143.

² *McGowan v. St. Louis etc. R. R. Co.*, 61 Mo. 528.

³ *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Morgan v. Vale of Neath R. R. Co.*, 5 Best & S. 736; 5 Best & S. 570; *Tunney v. Midland R. R. Co.*, L. R. 1 Com. P. 291; *contra*, *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336.

⁴ *Moran v. New York etc. R. R. Co.*, 3 Thomp. & C. 770; 67 Barb. 96.

⁵ *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417.

⁶ *Columbus etc. R. R. Co. v. Arnold*,

31 Ind. 174; 99 Am. Dec. 615; overruling *Fitzpatrick v. New Albany etc. R. R. Co.*, 7 Ind. 436.

⁷ *St. Louis etc. R. R. Co. v. Britz*, 72 Ill. 256.

⁸ *Cumberland Coal and Iron Co. v. Scally*, 27 Md. 589.

⁹ *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49; 38 Am. Dec. 339.

¹⁰ *Hayes v. Western R. R. Corp.*, 3 Cush. 270.

¹¹ *Conway v. Belfast etc. R. R. Co.*, 1 R. 9 C. L. 498.

¹² *Morgan v. Vale of Neath R. R. Co.*, L. R. 1 Q. B. 149; 5 Best & S. 736; 5 Best & S. 570.

¹³ *Dow v. Kansas Pacific R. R. Co.*, 8 Kan. 642.

the same company;¹ a repairer of cars at a particular station, and an engineer in charge of a switch-engine at the same station, although each received his orders from a different foreman;² the servants of a person who had contracted to deliver wood to a railroad company, and the engineer, fireman, and conductor furnished by the railroad company, in pursuance of the terms of the contract, who were associated together on the same train;³ the engineer and shovelers on a gravel train;⁴ a servant employed at a particular station, whose duties consisted in coupling and uncoupling trains, and the engineer and conductor of any train that might come along and need his services in switching cars;⁵ a brakeman and a section-boss whose duty it was to tend the switch at a particular station;⁶ a brakeman and the engineer on the same train;⁷ a guard on a train on an English railway and the "ganger," whose duty it is to inspect the track and see that such tree-nails are renewed as are decayed;⁸ a station-master having charge of the freight trains of a certain division of the road and the engineer of such a train;⁹ a car repairer and the head brakeman and yard-master at a particular yard;¹⁰ the general superintendant of a railroad, the supervisor of the road and engineer, a section-master, and a common laborer;¹¹ the laborers on a gravel or construction train and the conductor or engineer of the same;¹² a railroad conductor and engineer on the same

¹ Louisville etc. R. R. Co. v. Robinson, 4 Bush, 507.

² Chicago etc. R. R. Co. v. Murphy, 53 Ill. 336; 5 Am. Rep. 48; Valdez v. Ohio etc. R. R. Co., 85 Ill. 500.

³ Illinois etc. R. R. Co. v. Cox, 21 Ill. 20; 71 Am. Dec. 298.

⁴ Ohio etc. R. R. Co. v. Tindall, 1 Ind. 366; 74 Am. Dec. 259.

⁵ Wilson v. Madison etc. R. R. Co., 18 Ind. 226.

⁶ Slatery v. Toledo etc. R. R. Co., 23 Ind. 81.

⁷ Summerhays v. Kansas Pacific R. Co., 2 Col. 484; St. Louis etc. R.

R. Co. v. Britz, 72 Ill. 256; Nashville etc. R. R. Co. v. Wheless, 10 Lea,

741; 43 Am. Rep. 317; Pittsburg etc. R. R. Co. v. Ranney, 37 Ohio St. 665.

⁸ Waller v. South Eastern R. R. Co., 2 Hurl. & C. 102.

⁹ Evans v. Atlantic etc. R. R. Co., 62 Mo. 49.

¹⁰ Besel v. Railroad Co., 70 N. Y. 171.

¹¹ Mobile etc. R. R. Co. v. Smith, 6 Rep. 264.

¹² Ryan v. Cumberland Valley etc. R. R. Co., 23 Pa. St. 384; Chicago etc. R. R. Co. v. Keefe, 47 Ill. 108.

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train;¹ one of a gang of track repairers and the foreman of the gang;² a brakeman on one train and the conductor or engineer on another train belonging to the same company;³ a track repairer and the fireman or engineer of a passing train;⁴ an inspector of the track and the servants of the company in charge of passing trains;⁵ a laborer employed in getting out ballast and a track-layer who had laid a temporary track on which such laborer was at work;⁶ a brakeman and the conductor and engineer of the same train;⁷ a train dispatcher and a brakeman;⁸ an employee in a railroad repair-shop and another employee in a different department of the shop;⁹ a "gang-boss" and a workman on a railroad;¹⁰ the master of a vessel and the mate;¹¹ the road-master of a railroad and an engineer or fireman;¹² a telegraph operator at a railroad station and a locomotive engineer;¹³ a switchman and a car inspector;¹⁴ a track repairer and an employee on a train;¹⁵ an engineer running a switch-engine and a switch-tender;¹⁶ one running a steam-engine for hoisting in a mine and workmen in the mine;¹⁷ an engineer of one train and an engineer of another train on the same road;¹⁸ an engineer in charge of a steam-shovel and a workman engaged with the machine;¹⁹ a road-man in a mine and a miner;²⁰ the

¹ Ragsdale v. Memphis etc. R. R. Co., 59 Tenn. 426.

² Weger v. Pennsylvania R. R. Co., 55 Pa. St. 460.

³ Pittsburgh etc. R. R. Co. v. Devinney, 17 Ohio St. 197.

⁴ Whaalan v. Mad River etc. R. R. Co., 8 Ohio St. 249; Boldt v. New York etc. R. R. Co., 18 N. Y. 432; Ohio etc. R. R. Co. v. Collarn, 8 Cent. L. J. 12; 7 Rep. 143.

⁵ Coon v. Syracuse etc. R. R. Co., 5 N. Y. 492.

⁶ Lovegrove v. London etc. R. R. Co., 16 Com. B. N. S., 669.

⁷ Sherman v. Rochester etc. R. R. Co., 17 N. Y. 153; Johnston v. Pittsburgh R. R. Co., 114 Pa. St. 443.

⁸ Robertson v. Railroad Co., 78 Ind. 77; 41 Am. Rep. 552.

⁹ Murphy v. Railroad Co., 88 N. Y. 146; 42 Am. Rep. 240.

¹⁰ Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; 42 Am. Rep. 543; Chicago etc. R. R. Co. v. Simmons, 11 Ill. App. 147; Doughty v. Log Driving Co., 76 Me. 143.

¹¹ Mathews v. Case, 61 Wis. 491; 50 Am. Rep. 151.

¹² Walker v. Boston etc. R. R. Co., 128 Mass. 8.

¹³ Dana v. Railroad Co., 23 Hun, 473.

¹⁴ Gibson v. Railroad Co., 22 Hun, 289.

¹⁵ Gormley v. Railroad Co., 72 Ind. 31.

¹⁶ Chicago etc. R. R. v. Henry, 7 Ill. App. 322.

¹⁷ Buckley v. Mining Co., 14 Fed. Rep. 833.

¹⁸ Chicago etc. R. R. Co. v. Doyle, 60 Miss. 977.

¹⁹ Thompson v. Railroad Co., 18 Fed. Rep. 239.

²⁰ Tronghear v. Coal Co., 62 Iowa, 576.

conductor of a gravel or construction train and a laborer thereon;¹ a station agent and an engineer of a locomotive running on the tracks about the station;² a foreman in charge of a derrick and a workman moving stone on a truck;³ an engineer on a train and a workman in the engine-yard;⁴ a fireman and brakeman on a train;⁵ car inspectors and brakemen on the same road;⁶ a foreman of a night-crew and a night-watcher;⁷ a foreman of a car-yard and a car-mover;⁸ a master machinist of a railroad and a fireman;⁹ coal-heavers and firemen of a railroad and track-walkers;¹⁰ a stevedore and a boatswain engaged to perform a single operation;¹¹ a brakeman and the engineer;¹² a laborer employed in constructing a sewer and one having the oversight and direction of the work;¹³ an employee of the state, injured while digging clay, and the captain of a boat belonging to the state, under whose direction he was acting;¹⁴ a servant employed to operate a machine and other operatives who repair it;¹⁵ a laborer who shoveled grain for an elevator company and the captain of a tug owned by the company engaged in bringing a vessel to the elevator;¹⁶ a track repairer and a trainman;¹⁷ the engineer of a coal-mine, whose duty it is to lower and raise the cages, and a common laborer, preparing the bottom of the shaft to receive them;¹⁸ the conduc-

¹ *Heine v. Railroad Co.*, 58 Wis. 525; *Cassidy v. Railroad Co.*, 76 Me. 488; *St. Louis etc. R. R. Co. v. Shackelford*, 42 Ark. 417.

² *Brown v. Railroad Co.*, 31 Minn. 553.

³ *Scott v. Sweeney*, 34 Hun, 292.

⁴ *Texas etc. R. R. Co. v. Harrington*, 62 Tex. 597.

⁵ *Galveston etc. R. R. Co. v. Faber*, 63 Tex. 344.

⁶ *Little Miami R. R. Co. v. Fitzpatrick*, 42 Ohio St. 318.

⁷ *Chicago etc. R. R. Co. v. Geary*, 110 Ill. 383.

⁸ *Fraker v. Railroad Co.*, 32 Minn. 54.

⁹ *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174; 99 Am. Dec. 615.

¹⁰ *Schultz v. Railroad Co.*, 67 Wis. 616; 58 Am. Rep. 881.

¹¹ *Smith v. The Furnessia*, 30 Fed. Rep. 878.

¹² *Missouri Pac. R. R. Co. v. Texas and Pacific R. R. Co.*, 31 Fed. Rep. 527.

¹³ *Conley v. Portland*, 78 Me. 217.

¹⁴ *Loughlin v. State*, 105 N. Y. 159.

¹⁵ *Reading Iron Works v. Devine*, 109 Pa. St. 246.

¹⁶ *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

¹⁷ *Corbett v. St. Louis and Iron Mountain etc. R. R. Co.*, 26 Mo. App. 621.

¹⁸ *Starne v. Schlothane*, 21 Ill. App. 97.

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tor and engineer of a construction train and a shoveler thereon, having the same master;¹ a track-walker and a locomotive fireman;² a mining boss and a miner;³ a brakeman and a car-inspector;⁴ an engineer and a coupler of a train;⁵ a track repairer and an engineer of an elevated railroad;⁶ a section-hand and an engineer of a train;⁷ a foreman of a mine and a miner employed to work under him;⁸ the brakeman and the conductor on a train;⁹ locomotive engineers;¹⁰ an engineer of a train and a switchman;¹¹ the foreman at the round-house and an employee working under him;¹² the station agent and a brakeman on a train;¹³ a second mate and a seaman;¹⁴ a "wiper" of engines and the employees in charge of a train.¹⁵

§ 320. Who are not Fellow-servants. — And these have been held not fellow-servants within the rule as to common employment, viz.: A carpenter employed by the railroad company and train-men in charge of a train on which he is riding to his work;¹⁶ a draughtsman in a locomotive-works and a carpenter and workmen excavating a cellar under the building;¹⁷ a pilot and one of the crew of the vessel;¹⁸ a train dispatcher and an ordinary employee;¹⁹ a locomotive engineer and a laborer on a

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¹ Chicago and Alton R. R. Co. v. McDonald, 21 Ill. App. 409.

² Schultz v. Chicago and Northwestern R. R. Co., 67 Wis. 616; 58 Am. Rep. 881.

³ Redstone Coke Co. v. Roby, 115 Pa. St. 364.

⁴ Philadelphia etc. R. R. Co. v. Hughes, 119 Pa. St. 301.

⁵ Boatwright v. Railroad Co., 25 S. C. 128.

⁶ Van Wickle v. Railroad Co., 32 Fed. Rep. 278.

⁷ Easton v. Railroad Co., 32 Fed. Rep. 893.

⁸ Stephens v. Doe, 73 Cal. 26.

⁹ Brown v. Cent. Pac. R. R. Co., 72 Cal. 523.

¹⁰ Van Avery v. Union Pac. R. R. Co., 35 Fed. Rep. 40.

¹¹ Naylor v. N. Y. Cent. R. R. Co., 33 Fed. Rep. 801.

¹² Gonsior v. Railroad Co., 36 Minn. 385.

¹³ Toner v. Railroad Co., 69 Wis. 188.

¹⁴ Roberts v. Egyptian Monarch, 36 Fed. Rep. 773.

¹⁵ Ewald v. Railroad Co., 70 Wis. 420.

¹⁶ O'Donnell v. Railroad Co., 59 Pa. St. 239; 98 Am. Dec. 336.

¹⁷ Baird v. Pottit, 70 Pa. St. 477.

¹⁸ Smith v. Steele, L. R. 10 Q. B. 125.

¹⁹ Booth v. Railroad Co., 67 N. Y. 593; 73 N. Y. 38; 29 Am. Rep. 97.

railroad;¹ a section foreman of a railroad and a brakeman;² the fireman on a locomotive and a track repairer;³ the conductor of a railroad material train and a train-man or laborer;⁴ a section-hand and a train-man;⁵ the conductor of a construction train and a gang of day-laborers;⁶ a train dispatcher and a locomotive engineer;⁷ a car-inspector and a car-coupler;⁸ railroad employees on different trains;⁹ section-hands of a railroad and a brakeman;¹⁰ the master of a steam-tug and the foreman;¹¹ a switchman and a section foreman;¹² the carpenters who erect a scaffold and a laborer who carries bricks thereon;¹³ the conductor of a train and the engineer;¹⁴ a deck-hand on a boat and the pilot;¹⁵ a contractor to break rock at a certain price per foot and the superintendent of the mine;¹⁶ a brakeman and the conductor of another road;¹⁷ a brakeman on a freight train and a master mechanic of the road;¹⁸ a master mechanic and the foreman of the railroad shops;¹⁹ a car-inspector in the railroad yards and brakemen on the road;²⁰ the employee of the E. company engaged in shoveling ashes from a pit and the engineer of a locomotive belonging to the T. company, though the E. company had exclusive control over the servants of the T. company employed on its locomotives while in the yard;²¹ a servant

¹ *Ryan v. Railroad Co.*, 60 Ill. 171; 14 Am. Rep. 32.

² *Lewis v. Railroad Co.*, 59 Mo. 495; 21 Am. Rep. 385.

³ *Chicago etc. R. R. Co. v. Moranda*, 93 Ill. 302; 34 Am. Rep. 168.

⁴ *Moon v. Railroad Co.*, 78 Va. 745; 49 Am. Rep. 401; *Coleman v. Railroad Co.*, 25 S. C. 446; 60 Am. Rep. 516.

⁵ *Moon v. Railroad Co.*, *supra*.

⁶ *Chicago etc. R. R. Co. v. Swanson*, 16 Neb. 254; 49 Am. Rep. 718.

⁷ *Darrigan v. Railroad Co.*, 52 Conn. 285; 52 Am. Rep. 590.

⁸ *Tierney v. Railroad Co.*, 33 Minn. 311; 53 Am. Rep. 35.

⁹ *Cooper v. Mullins*, 30 Ga. 146; 76 Am. Dec. 638.

¹⁰ *Vautrain v. Railroad Co.*, 8 Mo. App. 538.

¹¹ *The Clatsop Chief*, 7 Saw. 274.

¹² *Hall v. Missouri R. R. Co.*, 74 Mo.

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¹³ *Green v. Banta*, 16 Jones & S. 156.

¹⁴ *Chicago etc. R. R. Co. v. Ross*, 112

U. S. 377.

¹⁵ *The Titan*, 23 Fed. Rep. 413.

¹⁶ *Mayhew v. Mining Co.*, 76 Me. 100.

¹⁷ *Zeigler v. Danbury R. R. Co.*, 52 Conn. 543.

¹⁸ *Cooper v. Railroad Co.*, 24 W. Va. 37.

¹⁹ *St. Louis etc. R. R. Co. v. Harper*, 44 Ark. 524.

²⁰ *Little Miami R. R. Co. v. Fitzpatrick*, 42 Ohio St. 318.

²¹ *Sullivan v. Tioga R. R. Co.*, 44 Hun, 304.

ignorant of the use of a machine and an instructor furnished him, from whose incompetency or negligence the servant is injured;¹ a section-hand and a section-boss;² a laborer employed by a contractor engaged in grading a railroad and the engineer of a train furnished by the company to move the dirt;³ an engineer in charge of a train and a brakeman acting under his orders;⁴ an assistant foreman having charge of the department and a workman engaged therein under his orders;⁵ one employed to superintend the construction of a cistern and one of the workmen whom he employs;⁶ a servant to whom a master intrusts the duty of furnishing machinery for other servants and such other servants;⁷ a brakeman and a car-inspector;⁸ a car-inspector and a yard-master;⁹ a subcontractor for building bridges for a railroad and those employed by it in managing its trains;¹⁰ a switchman and a yard-master engaged at the time as engineer;¹¹ a master mechanic and wreck-master and a bridge carpenter;¹² an employee on a freight train and an employee on a passenger train;¹³ a conductor of train and an employee on the train;¹⁴ a telegraph operator and the conductor of a train;¹⁵ a foreman of gang and a laborer;¹⁶ an engineer and a brakeman.¹⁷

¹ *Brennan v. Gordon*, 13 Daly, 208.

² *Patton v. Western North Carolina R. R. Co.*, 96 N. C. 455.

³ *Louisville, New Orleans, etc. R. R. Co. v. Conroy*, 63 Miss. 562.

⁴ *East Tennessee and Western North Carolina R. R. Co. v. Collins*, 85 Tenn. 227; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135.

⁵ *Dutzi v. Geisel*, 23 Mo. App. 676.

⁶ *Mulcairns v. Janesville*, 67 Wis. 24.

⁷ *Kelly v. Erie Telegraph and Telephone Co.*, 34 Minn. 321.

⁸ *Missouri Pacific R'y Co. v. Dwyer*, 36 Kan. 58.

⁹ *Macy v. St. Paul and Duluth R. R. Co.*, 35 Minn. 200.

¹⁰ *Donaldson v. Railroad Co.*, 18 Iowa, 280; 87 Am. Dec. 391.

¹¹ *Harvey v. Railroad Co.*, 36 Fed. Rep. 657.

¹² *Tabler v. Railroad Co.*, 93 Mo. 79.

¹³ *Central Trust Co. v. Wabash etc. R. R. Co.*, 34 Fed. Rep. 616.

¹⁴ *Boatwright v. Railroad Co.*, 25 S. C. 128; *Coleman v. Railroad Co.*, 25 S. C. 446; 60 Am. Rep. 516.

¹⁵ *East Tenn. R. R. Co. v. De Armond*, 86 Tenn. 73.

¹⁶ *Wabash etc. R. R. v. Hawk*, 121 Ill. 259; 2 Am. St. Rep. 83.

¹⁷ *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135; *Louisville etc. R. R. Co. v. Moore*, 83 Ky. 675.

§ 321. **Superior Servant having Control of Inferiors, a "Vice-principal."**—Where the master delegates to a servant, such as a foreman or superintendent, the management of his business or a department of it, the servant becomes a vice-principal, and inferior servants, subject to his orders and control, and injured by his negligence, can recover of the master. The vice-principal is not a "fellow-servant" as to them.¹ The selection of an employee by a superintendent who has entire charge of the work, with power to hire and discharge servants, is the act of the master; not that of a fellow-servant.² Under this rule, it has been held that the following are vice-principal and servant, and not "fellow-servants," viz.: The general manager of a railroad and an engineer on one of the trains of the company;³ a superintendent of a machine-

¹ Washburn v. Railroad Co., 3 Head, 638; 75 Am. Dec. 784; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; Cleveland etc. R. R. Co. v. Keary, 3 Ohio St. 201; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 292; 27 Am. Rep. 510; Railroad Co. v. Collins, 2 Duvall, 114; Whaelan v. Mad River R. R. Co., 8 Ohio St. 249; Gormly v. Vulcan Iron Works, 61 Mo. 492; Brothers v. Cartter, 52 Mo. 373; 14 Am. Rep. 424; Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. Rep. 369; Mullan v. Railroad Co., 78 Pa. St. 25; 21 Am. Rep. 2; Dobbin v. Railroad Co., 81 N. C. 446; 31 Am. Rep. 512; Tyson v. Railroad Co., 61 Ala. 554; 32 Am. Rep. 8; Cowles v. Railroad Co., 84 N. C. 309; 37 Am. Rep. 621; Mitchell v. Robinson, 80 Ind. 281; 41 Am. Rep. 812; Wilson v. Williman-tio Linen Co., 50 Conn. 433; 47 Am. Rep. 653; Miller v. Railroad Co., 17 Fed. Rep. 67; Greville v. Railroad Co., 3 McCrary, 352; Gilmore v. Railroad Co., 18 Fed. Rep. 866; Quinn v. New Jersey Lighterage Co., 23 Fed. Rep. 363; Louisville etc. R. R. Co. v. Fil-bern, 6 Bush, 574; 99 Am. Dec. 690; Jones v. Old Dominion Cotton Mills, 82 Va. 140; 3 Am. St. Rep. 92; Farren v. Sellers, 39 La. Ann. 1011; 4 Am. St. Rep. 256. See Crispin v. Babbitt, 81

N. Y. 516; 37 Am. Rep. 521; L. & N. R. R. Co. v. Lahr, 86 Tenn. 335. In Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573, the court says: "When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the *alter ego* of the master, to whom the employer has left everything, then the middle-man's negligence is the negligence of the employer, for which the latter is liable. The servant in such case represents the master and is charged with the master's duty: Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. Rep. 369; Murphy v. Smith, 19 Conn. B., N. S., 361. When the middle-man or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants in employing and selecting such servants, and in the general conduct of the business committed to his care."

² Henry v. Brady, 9 Daly, 142.

³ Krogg v. Atlanta etc. R. R. Co., 77 Ga. 202; 4 Am. St. Rep. 79.

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shop and an errand-boy employed therein;¹ a girl employed in a hemp factory and the foreman;² the engineer of a manufactory and the fireman;³ the superintendent of work of a railroad and a teamster;⁴ the foreman of a wrecking gang and the members of the crew;⁵ the architect and superintendent of a building and the workmen;⁶ the section-boss of a railroad and workmen working under him;⁷ the conductor of a construction train and a laborer employed thereon;⁸ the superintendent of a railroad company and its ordinary employees;⁹ the captain of a ship and one of the crew;¹⁰ a captain of a mine and a laborer employed therein;¹¹ the mate of a vessel and a sailor or deck-hand;¹² the conductor of a train and the engineer and brakemen;¹³ a stevedore's foreman, intrusted with the supervision of unloading a vessel, and the laborers employed by him;¹⁴ a train dispatcher and those engaged in the operating of the trains;¹⁵ the mate of a ship and the seamen;¹⁶ the foreman of a gang of laborers with power to discharge them and a laborer;¹⁷ the engineer of a locomotive and the general manager of a railroad;¹⁸ a train dispatcher and the conductor or engineer;¹⁹ a section-boss and the brakeman on a train.²⁰ Says a writer of authority:²¹

¹ *Railroad Co. v. Fort*, 17 Wall. 553; 2 Dill. 259.

² *Grizzle v. Frost*, 3 Post. & F. 622; and see *Nashville etc. R. R. Co. v. Jones*, 9 Heisk. 27.

³ *Mann v. Oriental Print Works*, 11 R. I. 152; and see *Cooper v. Railroad Co.*, 44 Iowa, 134.

⁴ *Cook v. Railroad Co.*, 63 Mo. 397.

⁵ *Wabash etc. R. R. Co. v. Hawk*, 121 Ill. 259; 2 Am. St. Rep. 83.

⁶ *Whalen v. Centenary Church*, 62 Mo. 326.

⁷ *Louisville etc. R. R. Co. v. Bowler*, 9 Heisk. 866.

⁸ *Chicago etc. R. R. Co. v. Bayfield*, 37 Mich. 205.

⁹ *Washburn v. Railroad Co.*, 3 Head, 638; 75 Am. Dec. 784.

¹⁰ *Ramsey v. Quinn*, 4 Cent. L. J. 478.

¹¹ *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35.

¹² *Olson v. Clyde*, 32 Hun, 425; *Daub v. Railroad Co.*, 18 Fed. Rep. 625.

¹³ *Chicago etc. R. R. Co. v. Rosa*, 112 U. S. 377.

¹⁴ *Brown v. Sennett*, 68 Cal. 225; 58 Am. Rep. 8.

¹⁵ *Smith v. Railroad Co.*, 92 Mo. 359; 1 Am. St. Rep. 729; *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631.

¹⁶ *Scharff v. Metcalf*, 107 N. Y. 211.

¹⁷ *Criswell v. Railroad Co.*, 30 W. Va. 799.

¹⁸ *Krogg v. Railroad Co.*, 77 Ga. 202; 4 Am. St. Rep. 79.

¹⁹ *Smith v. Railroad Co.*, 92 Mo. 359; 1 Am. St. Rep. 729; *Lewis v. Seifert*, 116 Mass. 628; 2 Am. St. Rep. 631.

²⁰ *Hulehan v. Railroad Co.*, 68 Wis. 520.

²¹ 2 *Thompson on Negligence*, p. 1030.

"It is held that if a master delegates to a superintendent the power to employ and discharge servants, which belongs to him as master, he thereby makes himself liable for injuries sustained by a servant, caused by the negligence of such superintendent¹ in selecting an insufficient number of servants for the duty required of them² or in selecting a servant unfit for the duties required of him,³ or for an injury through the negligence of the servants employed by such superintendent while acting under his orders."⁴

ILLUSTRATIONS.—Plaintiff, under the direction of defendant's foreman, put up a staging about twenty-eight feet high, firmly nailing the two planks which constituted the floor. During his absence, another workman, under direction of the foreman, removed one of the planks, placing another in its place, without fastening it. Plaintiff, not knowing that any change had been made, returned to his work on the staging, which let him fall to the ground. Held, that not the failure of plaintiff's fellow-workman to nail the plank which replaced the nailed one, but the act of the foreman in misleading plaintiff into danger, was the cause of the injury, for which defendant was liable: *Heckman v. Mackey*, 35 Fed. Rep. 353. The foreman and general superintendent of a machine-shop hired a boy, and told him to do whatever K., another employee, directed him. K., being in charge of dangerous machinery, told the boy to do a certain act in regard to it, whereby he was injured. Held, that K. and the boy were not fellow-servants as to that act, and the boy could recover against the principal: *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298. The foreman of a gang of men employed by a railroad corporation negligently gave, and insisted on, an order in reference to moving a car and some

¹ *Brothers v. Cartter*, 52 Mo. 373; 14 Am. Rep. 424; *Stoddard v. St. Louis etc. R. R. Co.*, 65 Mo. 514; *Kansas Pacific R. R. Co. v. Little*, 19 Kan. 267; *Walker v. Bolling*, 22 Ala. 294; *Chapman v. Erie R. R. Co.*, 55 N. Y. 579, 583. "When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable

for the neglects and omissions of duty of the one charged with the selection of other servants, in employing and selecting such servants, and in the general conduct of the business committed to his care": *Malone v. Hathaway*, 64 N. Y. 5; 21 Am. Rep. 573, per Allen, J.

² *Stoddard v. St. Louis etc. R. R. Co.*, 65 Mo. 514.

³ *Walker v. Bolling*, 22 Ala. 294.

⁴ *Lydon v. Manion*, 3 Mo. App. 601, 602.

lumber, obedience to which, on the part of one of the men, caused the lumber to fall, injuring him. *Held*, that the foreman was the representative of the corporation, and that the rule which exempts a master from liability for the negligence of a servant towards a fellow-servant was inapplicable: *Chicago etc. R. R. Co. v. May*, 108 Ill. 288. A workman was injured by a defective rigging of a derrick, the ropes having become stretched by the rain of the night before the morning of the accident. The foreman who had charge of the derrick superintended its starting. *Held*, that the owner was liable for the injury: *Courtney v. Cornell*, 49 N. Y. Sup. Ct. 286. An employee, in assisting to get a car on the track, is injured by the breaking of an old worn rope, used by direction of the road-master superintending the job. *Held*, that he may recover damages: *Galveston etc. R. R. Co. v. Delahunty*, 53 Tex. 206. The rules of a railroad company required that "conductors must in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where orders are received," and that "the engineer must read and understand the order before leaving the station." *Held*, that the engineer was subordinate to the conductor, and they were not fellow-servants: *Ross v. Railroad Co.*, 2 McCrary, 235. A conductor orders a brakeman to get off a train moving at the rate of four miles an hour in the night-time, and the brakeman obeys, using such care as he may, and is injured by alighting on a skid left by train-hands between the tracks. *Held*, that he may maintain an action against the company; and it is no defense that the conductor, under the company's rules, had no right to order a man off a moving train: *Central R. R. Co. v. De Bray*, 71 Ga. 406. A plumber employed in a railroad company's repair-shops was directed by the master mechanic, to whose orders he was subject, to hold a piece of timber between a tender and an approaching locomotive to prevent a direct collision, and so holding he asked the mechanic if that was right, to which the latter replied: "Yes, that will do." The engine striking higher up than the buffer of the tender brought the timber violently against the plumber, and severely injured him. *Held*, that the company was liable therefor: *Douglas v. Railroad Co.*, 63 Tex. 564.

§ 322. **Servant having Charge of Construction or Repair of Machinery Used by Other Servants.**—On this ground, it is held in the best considered of the cases on the subject that a servant who has charge of the construction and repairs of the machinery, or the buildings or

works used, is not, in the master's absence, to be deemed a fellow-servant with a servant who is employed in connection with its running operations. The former is a vice-principal.¹ Other courts, however, hold that the master is not liable where the injury happens in consequence of the negligence of his master mechanic, inspector of machinery, or other servant or servants whose duty it is to see that his machinery is kept in safe condition for use, if such servant was a competent and fit person to be so employed, and if the master has been guilty of no personal negligence in employing him or in retaining him in his service.²

§ 323. **Servants of Different Masters.**—It is generally requisite that the servants, to be "fellow-servants," should be servants of the same master.³ Therefore the servants of an independent contractor are not "fellow-servants" of the servants of the employer for whom the contractor is working.⁴ The rule as to fellow-servants is not applica-

¹ *Shanny v. Androsoggin Mills*, 66 Me. 420; charge of the court below in *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 272; *Houston etc. R. R. Co. v. Dunham*, 49 Tex. 181; *Cumberland etc. R. R. Co. v. State to Use of Moran*, 44 Md. 284; *Cumberland etc. R. R. Co. v. State to Use of Hogan*, 45 Md. 229; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Brabbits v. Chicago etc. R. R. Co.*, 38 Wis. 289; *Mullan v. Philadelphia etc. R. R. Co.*, 78 Pa. St. 25; 21 Am. Rep. 21; *Lewis v. St. Louis etc. R. R. Co.*, 59 Mo. 495; 21 Am. Rep. 381; *Kansas Pac. R. R. Co. v. Little*, 19 Kan. 267; *Illinois etc. R. R. Co. v. Welch*, 52 Mo. 183; 4 Am. Rep. 593; *Colorado etc. R. R. Co. v. Ogden*, 3 Col. 499; *Railroad Co. v. Stont*, 17 Wall. 553; *Spelman v. Railroad Co.*, 56 Barb. 151; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; *Gunter v.*

Graniteville Mfg. Co., 18 S. C. 262; 44 Am. Rep. 573; *Davis v. Railroad Co.*, 55 Vt. 84; 45 Am. Rep. 590; *Kain v. Smith*, 25 Hun, 146; *Houston etc. R. R. Co. v. Marcelles*, 59 Tex. 334; *Atchison etc. R. R. Co. v. Moore*, 31 Kan. 197; *Mulvey v. Locomotive Works*, 14 R. I. 204.

² See 2 *Thompson on Negligence*, pp. 1040 et seq.; *McGee v. Boston Cordage Co.*, 139 Mass. 445.

³ *McAndrews v. Burns*, 39 N. J. L. 119; *Smith v. Railroad Co.*, 19 N. Y. 127; 75 Am. Dec. 305; *Shearman and Redfield on Negligence*, sec. 116; *Swainson v. Railroad Co.*, L. R. 3 Ex. Div. 341; *Sawyer v. Railroad Co.*, 27 Vt. 370; *Carroll v. Railroad Co.*, 13 Minn. 30; 97 Am. Dec. 221; *Cooper v. Mullins*, 30 Ga. 146; 76 Am. Dec. 638.

⁴ *Svenson v. Pacific Mail Co.*, 57 N. Y. 108; *Young v. Railroad Co.*, 30 Barb. 299; *Abraham v. Reynolds*, 5 Hurl. & N. 142; *Burke v. Railroad Co.*, 34 Conn. 474; *contra*, *Johnson v. Boston*, 118 Mass. 114; *Illinois Cent. R. R. Co. v. Cox*, 21 Ill. 20; 71 Am.

ble to a case where a servant of tenants has been injured by the negligence of a servant of the owner employed in the same room to manage an engine working an elevator, upon which the injury occurred.¹ An agreement between connecting roads, in order to secure speed and comfort for through-passenger travel between certain points, does not make an employee of one of the roads the fellow-servant of an employee of another one.²

ILLUSTRATIONS. — A railroad company, A, permitted another company, B, to use its station, subject to its rules and to the control of its station-master, and one of its servants was injured by the negligence of an engine-driver of B company, who shunted a train upon the siding without giving or receiving the signal re-

Dec. 298; *Wiggett v. Fox*, 11 Ex. 832. In *Harkins v. Standard Sugar Refinery*, 122 Mass. 400, the court said: "The alleged injury was caused by the breaking of the rope furnished by the master rigger. The rope broke while hoisting a beam, either by reason of its own imperfection or the unskillfulness with which it was used by the rigger. The rigger was either the servant of the defendant, or a contractor having exclusive control of the work he had contracted to do. If he was a contractor, the defendant would not be liable for any injury caused by his negligence, whether arising from the selection of his tackle or the manner of using it: *Connors v. Hennessy*, 112 Mass. 96, and cases cited. If not a contractor, but a servant, then he and those employed under him to do the hoisting were fellow-servants with the master mason and the men employed as masons under him, of whom the plaintiff's intestate was one. They, together with the carpenters, were engaged in the common employment of erecting and completing the structure, under the general direction of the defendant's agent: *Johnson v. Boston*, 118 Mass. 114. All the master mechanics thus employed were to furnish the men, tools, and tackle necessary to do the work in their respective departments. A master thus employing servants to do a certain work, and to furnish the tools and other appliances necessary for the prosecution of the

work, is responsible to a fellow-servant only for care in the selection of the men thus employed. He is not responsible for a defective ax, rope, or trowel so furnished, which, in the hands and under the control of one of his servants, injures a fellow-servant, any more than he is responsible to his servant for the careless and negligent manner in which such tool or appliance is used by a fellow-servant. Suppose a carpenter and plumber are engaged in the common employment of making repairs, each bringing, as is usual in such cases, his own tools: the master would not be liable for an injury to the carpenter caused by a defect in the furnace of the plumber. Two woodmen are employed to cut down trees, and they both bring their own axes: it could not be contended, if one is injured by a defect in the ax of the other, that the master would be responsible. The workman takes the risks of the employment he engages in, which include the results of negligence on the part of others engaged in the same service; and where all furnish their own tools, and are engaged in a common employment, the workman takes the risk of the negligence of his fellow-workman in selecting and caring for his tools, as well as in the use of them."

¹ *Stewart v. Harvard College*, 12 Allen, 58.

² *Philadelphia, Wilmington, etc. R. Co. v. State*, 58 Md. 372.

quired by the rules of A company. *Held*, that such servant of A company was not a fellow-servant with the engine-driver of B company, and that B company must pay damages to him: *Warburton v. Railroad Co.*, L. R. 2 Ex. 30. A road of A company formed a junction with that of B company, and the cars of B company, under an arrangement between the two companies, ran for four miles over the road of A company. B company intrusted a servant of A company with the duty of switching its trains, so as to avoid collisions with the trains of A company, and gave him a joint time-table of the two roads to enable him to do so. Owing to the negligence of this servant, a train of B company collided with a train of A company while on the track of A company, killing a servant of A company. *Held*, that B company was liable for the damages: *Taylor v. Railroad Co.*, 45 Cal. 323. The plaintiff, a deck-hand on the steamboat A., was injured by the explosion of the boiler of the steamboat R., while the boats were near each other. The defendant was owner of the steamboat A., but had an agreement with the owner of the steamboat R. that each should employ the men and manage his own boat, and at the end of the season the profits of the boats should be divided between them. *Held*, that the defendant and the owners of the R. were partners, and each responsible for the negligence of the officers and crew of each boat; that the plaintiff and the crew of the R. were not fellow-servants: *Connolly v. Davidson*, 15 Minn. 519; 2 Am. Rep. 154. The plaintiff, while engaged in the employ of a telegraph company in distributing poles along the line of a railroad, and while upon a train on such railroad, was injured by the negligence of the railroad company's engineer upon the train. The train, in pursuance of a contract between the companies, was transporting men and materials of the telegraph company. The train was manned by employees of the railroad company, but was temporarily under the direction of the foreman of the telegraph company. *Held*, that the plaintiff could recover of the railroad company: *Coggin v. Railroad Co.*, 62 Ga. 685; 35 Am. Rep. 132.

§ 324. **When Relation of Master and Servant does not Subsist—Time.**—If a servant has quit his work for the day and started for his home, he is not to be deemed a fellow-servant with other servants of his master who are still engaged in the master's employment; but he stands as a stranger towards the master, and if he is injured by the negligence of such servants, the master is liable to

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him on the principle *respondeat superior*.¹ So where the servant is at the time on a private errand of his own, and not engaged in his master's work.² So where he is absent from his place, even without leave.³ A railroad company is not liable for an injury to an employee occurring while performing an individual service for his superior under the latter's direction.⁴

ILLUSTRATIONS.—B, the harbor-master of the city of Baltimore, in obedience to the requirements of the board of health, ordered a vessel to be removed from the wharf and to be moored in the stream. He employed C to do such duty, who, having finished it with his assistants, returned from the vessel to the shore in a boat belonging to the vessel, which they afterward abandoned and lost. *Held*, that from the time the vessel was moored in the stream C ceased to be B's agent, and that he was not responsible for any acts of his, or their consequences, after such time: *Brown v. Purviance*, 2 Har. & G. 316. A soap manufacturer employed women to work at one end of a room seventy-two feet in length, to wrap the soap in papers which were brought to them, and one of the women, returning out of working hours, went to the back part of the room to get some paper, and there fell into a reservoir of lye. *Held*, that the employer was not liable: *Neff v. Broom*, 70 Ga. 256. A laborer, after loading ice from a wharf upon a vessel, went on board for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. *Held*, that he was a mere intruder, and that the owners of the vessel were not liable for the injury: *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514. Plaintiff's intestate was hired from day to day as brakeman, running between X and Y every day except Sunday, for which day he was not paid unless employed. He was, however, expected to remain at X from Saturday night till Monday morning; but his family residing in Y, he received permission one Sunday to visit them, and while traveling thither under a conductor's pass, he was killed by the negligence of the company's employees. *Held*, that he was not a co-employee: *State v. Railroad Co.*, 63 Md. 433. The plaintiff was in the employ of a railroad company, his business being, with other laborers, to ballast part of their road, excavating gravel from certain banks,

¹ 2 Thompson on Negligence, sec. 43, p. 1046; Baltimore etc. R. R. Co. v. Trainor, 33 Md. 542; Baird v. Pettit, 70 Pa. St. 477; Brydon v. Stewart, 2 Macq. 30.

² Washburn v. Railroad Co., 3 Head, 638; 75 Am. Dec. 784.

³ Washburn v. Railroad Co., *supra*.

⁴ Hurst v. Railroad Co., 49 Iowa, 76.

loading it in gravel-cars, and then distributing it along the track. Some of the workmen, among them the plaintiff, lodged in C., a village two miles from the gravel banks, and by agreement with the company were to be conveyed to the village for meals and lodging, and then back to the banks. While so employed, the plaintiff, during his conveyance on a gravel-car to the banks to work, by the gross negligence of the engineer of the train he was riding on, was injured and his leg broken. *Held*, that the company was liable for the injury: *Fitzpatrick v. Railroad Co.*, 7 Ind. 436. A servant of a railroad company took down the bars in a fence on the side of the track, and left them down, whereby horses escaped at night from an adjoining field upon such track and were killed by the engine of the company; at the time of taking down the bars the servant was engaged in a business which concerned himself, and in which the company had no interest, but it was understood that by virtue of the employment of the servant by the company, that if the former at any time after his day's labor was over saw anything amiss, he was required to give the necessary attention to it without being specially directed to do so. *Held*, that the servant was negligent in leaving the bars down, and that the company was liable in damages therefor: *Chapman v. Railroad Co.*, 33 N. Y. 369; 88 Am. Dec. 392.

§ 325. **Volunteer Assisting Servant.**—A volunteer who assists a servant in an emergency cannot recover from the master for an injury caused by the negligence of the servant.¹ But it is otherwise if the person is not a mere volunteer, but interferes in order to expedite his own or his master's business.² Where an employee of a railroad

¹ *Degg v. Railroad Co.*, 1 Hurl. & N. 773; *Osborne v. Railroad Co.*, 68 Me. 49; 23 Am. Rep. 16; *Flower v. Railroad Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *Mayton v. Railroad Co.*, 63 Tex. 77; 51 Am. Rep. 637. One who at the request of a person in charge assists in a work without expecting pay is for the time being a servant: *Johnson v. Ashland Water Co.*, 71 Wis. 553; *Central Trust Co. v. Railroad Co.*, 32 Fed. Rep. 448. In an English case, however (*Cleveland v. Spier*, 16 Com. B., N. S., 398), workmen of the defendant, a gas-fitter, having come upon two pipes in the course of their digging in the road, and being doubtful as to which con-

tained gas, asked information of the plaintiff, who happened to be passing; the plaintiff thereupon going to the trench and pointed out the gas-main, into which the defendant's workmen proceeded to make a hole for the insertion of a service-pipe. This was done in a manner unnecessarily hazardous, in consequence of which a chip of the metal entered the plaintiff's eye, while he stood by looking on, and seriously injured him, for which the plaintiff was held entitled to recover.

² *Holmes v. Railroad Co.*, L. R. 4 Ex. 254; L. R. 6 Ex. 123; *Wright v. Railroad Co.*, L. R. 1 Q. B. Div. 252.

company, engaged in its service, summons his son, eleven years old, to his temporary assistance, and the son, while so assisting, is injured by the negligence of another railroad company, the latter is liable to the son therefor.¹ And where a servant engages in a temporary work for another, on the false representation that the master had directed it, he does not become the servant of that other so as to be remediless for an injury by the negligence of the latter's servant.²

ILLUSTRATIONS.—A railroad yard-man, whose business is not to couple cars, attempts to do so to accommodate an engineer, and is injured by the negligence of the engineer. *Held*, that the company is not liable: *Bradley v. Railroad Co.*, 14 Lea, 374. The conductor of a train ordered a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars. The boy refused, but on being threatened by the conductor uncoupled the cars, and in doing so was injured. *Held*, that the railroad company was not liable: *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356. The plaintiff was a passenger on a car of a street-railroad having but one track with occasional turn-outs. In turning out to avoid a car coming in the other direction, the car ran beyond the turn-out, and the driver requested the plaintiff to assist him in backing it upon the turn-out. While so engaged he was injured by the negligence of the driver of the other car. *Held*, that the railroad company was liable: *Street R. R. Co. v. Bolton*, 43 Ohio St. 224; 54 Am. Rep. 803. The owner gave general directions to his servant to throw the snow and ice from his roof; a friend of the servant voluntarily assisted him in the work. *Held*, that the owner was liable for an injury caused by snow and ice thrown down by either of the two: *Althorp v. Wolfe*, 22 N. Y. 355. A Pennsylvania statute gives one injured while lawfully engaged about the premises of a railroad company only an employer's right of action. *Held*, to apply to one who was injured while unloading his own goods from the cars of the company, permission to do which had been granted by the agent of the company: *Ricard v. Railroad Co.*, 89 Pa. St. 193.

§ 326. Evidence of Incompetence of Fellow-servant.—

The incompetence of the servant may be shown by evi-

¹ Pennsylvania *R. R. Co. v. Gallagher*, 40 Ohio St. 637; 43 Am. Rep. 689.

² *Kelly v. Johnson*, 128 Mass. 530; 35 Am. Rep. 398.

dence of general reputation.¹ Specific acts of carelessness may also be proved to show that the master had retained the servant in his service after he knew or ought to have known him to be incompetent.² Evidence that the servant was notoriously a drunkard is admissible in aggravation of damages.³

§ 327. **Evidence of Negligence in Selecting and Maintaining Machinery and Appliances—Cases in Which It was Held Sufficiently Shown.**—The following instances are given by a recent writer,⁴ where it was held that there was evidence of negligence to go to the jury: Where an employee was killed by the fall of an elevator, by reason of the chain being worn;⁵ where it appeared that the servant knew that the floor over which he was required to pass was decayed, and that there were holes in it, but it did not appear that he could have ascertained that the place where he broke through was dangerous, without examining part of the floor not open to his inspection;⁶ where a railway brakeman, in attempting to couple cars at a way-station in the night-time, stepped into an uncovered ditch which ran across the track and was killed;⁷ where a servant went upon a staging by his master's directions, and was injured by the fall of it, which staging was insecure in consequence of having been constructed of unsuitable materials, or in consequence of their having been fastened together insecurely, and which was built before the plaintiff began work, by persons who were afterwards his fellow-workmen, and he had directed what lumber should be used in it, though it was not built under his personal supervision.⁸

¹ *Frazier v. Railroad Co.*, 38 Pa. St. 10.; 80 Am. Dec. 467.

² *Pittsburg etc. R. R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111; *Baulec v. Railroad Co.*, 59 N. Y. 356; 17 Am. Rep. 325; *contra*, *Frazier v. Railroad Co.*, 38 Pa. St. 104; 80 Am. Dec. 467.

³ *Cleghorn v. Railroad Co.*, 56 N. Y. 44; 15 Am. Rep. 375.

⁴ 2 Thompson on Negligence, p. 1054.

⁵ *Hackett v. Middlesex Mfg. Co.*, 101 Mass. 101.

⁶ *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

⁷ *Plank v. New York etc. R. R. Co.*, 1 Thomp. & C. 319.

⁸ *Arkerson v. Dennison*, 117 Mass. 407.

§ 328. Cases in Which It was Held not Sufficiently Shown.—The following instances are given by the same author where it was held that there was no evidence of negligence to go to the jury: Where a railway switch-conductor, standing on a flat-car, signaled to the engineer to slack up, and the jerk produced by this movement threw him upon the track, where he was injured by two cars passing over him;¹ where a jury found specially that the defendant, a railroad company, was negligent in not having applied a sufficient test to a brake-shaft or rod, the supreme court, on an examination of the evidence, reversing the judgment below;² where a charwoman, directed by her employer's wife to wash clothes in the house, was cut by a fragment of glass which was found in the tub;³ where a manufacturer of locomotive engines had a crane worked on the tramway, supported on piers of brick-work, which piers were of insufficient strength, so that they gave way, causing an accident to one of the men employed in working the crane;⁴ where a person at work on a bridge fell and was killed, in consequence of the breaking of a plank which he and his fellow-workman had placed in position as part of a scaffold;⁵ where the *gravamen* of the action was, that the defendant, a railroad company, had failed to exercise due care in selecting and retaining in its service an employee through whose negligence the injury was done, and the court ruled that there was a failure of proof to support the allegation;⁶ where a proprietor, proposing to erect a building, employed one man to do the mason's work and another to do the carpenter's work, and a servant of the mason was injured by the fall of a ladder erected by the carpenter, it was held that this, without more, disclosed no cause of action

¹ Columbus etc. R. R. Co. v. Troesch, 57 Ill. 155; 68 Ill. 545; 18 Am. Rep. 578.

² Smith v. Chicago etc. R. R. Co., 42 Wis. 520.

³ Flynn v. Beebe, 98 Mass. 575.

⁴ Feltham v. England, L. R. 2 Q. B. 33, reversing 4 Fost. & F. 460.

⁵ Kelly v. Bridge Works, 17 Kan. 558.

⁶ Union Pacific R. R. Co. v. Milliken, 8 Kan. 647; Union Pacific R. R. Co. v. Young, 8 Kan. 658.

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against the owner of the building, since, for aught that appeared, the carpenter erected the ladder for his own use merely, and not for the use of the mason and his servants;¹ where the owner of a factory had supplied his building with proper appliances for extinguishing fire, the care and use of which were necessarily intrusted to his servants, the fact that the water failed to run on the occasion of the burning of his factory, in consequence of which an employee was injured, was held not evidence of negligence,—it was rather to be attributed to the negligence of fellow-servants;² where an employee sustains an injury by falling on a slippery floor against an uncovered cog of a printing-press;³ where a girl sixteen years old in the habit of using a card-cutting machine, the knife of which descended, when she placed her foot on the treadle, was injured by the descent of the knife, nothing more appearing to show neglect on the part of her employer.⁴

§ 329. Liability of Servant to Third Person.—A servant is not liable to a third person for an act of omission, as for failing to execute his master's orders, even though the third person is injured by such failure.⁵ But if, in executing his master's orders, he commits an act of mis-

¹ *Mercer v. Jackson*, 54 Ill. 397.

² *Jones v. Granite Mills*, 126 Mass. 84; 30 Am. Rep. 661.

³ *Clark v. Barnes*, 37 Hun, 389.

⁴ *Reardon v. New York Consolidated Card Co.*, 19 Jones & S. 134.

⁵ *Hill v. Caverly*, 7 N. H. 215; 26 Am. Dec. 735; *Harriman v. Stowe*, 57 Mo. 93; *Bissell v. Roden*, 34 Mo. 63; 84 Am. Dec. 71. "The law on this subject, as to principals and agents, is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances, negligences, and omissions of duty of his servant, in all the cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of

his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. The agent is personally liable to third persons for his own misfeasances and positive wrongs; but he is not, in general, liable to third persons for his own non-feasances, or omissions of duty, in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons, and the privity exists only between him and his principal. Therefore, the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondet superior*, and such is the general doctrine": *Harriman v. Stowe*, 57 Mo. 93.

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feasance or trespass, he will be personally liable to the person injured.¹ So a vice-principal is liable to an inferior servant injured by his negligence.² A servant is not liable for his master's wrongful conversion of a chattel that had been lawfully taken by the servant with the owner's consent.³

§ 330. **Liability of Servant to Master.**—The maxim *respondent superior* does not apply against the master in a suit against a negligent servant; and hence a servant is personally liable to the master for any damage occasioned by his misconduct to the master directly, or to a third person whom the master has been obliged to compensate.⁴ And this is so even where the negligence of another servant concurred in producing the injury.⁵ An engineer of a tug-boat was held to be liable to his employer for any damage thereto, by fire or otherwise, which could be fairly attributable to any act done or omitted by him as a natural result or just consequence, even though not directly so attributable.⁶ Employers cannot claim damages from a laborer for faulty construction of the thing they have employed him to make, if the defects in the plan they have prescribed and the tools they have furnished for the work have contributed, with unskillfulness of the employee, to render the result faulty.⁷ In the case of an injury to a third person that the employer has paid for, it is not necessary that the employer should resist the demand to action and judgment. He may recover what he voluntarily and actually paid, but not exceeding the sum for which he was made legally liable.⁸ A servant

¹ *Harriman v. Stowe*, 57 Mo. 93; *Wright v. Compton*, 53 Ind. 337; *Suydam v. Moore*, 8 Barb. 358; *Waul v. Hardie*, 17 Tex. 553.

² *Fort v. Whipple*, 11 Hun. 586.

³ *Silver v. Martin*, 59 N. H. 580.

⁴ *Thompson on Negligence*, p. 1061; *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647; *Mobile etc. R. R. Co. v. Clanton*, 59 Ala. 392; 31 Am. Rep. 15.

An express messenger is not an insurer to the company of the safety of goods intrusted to him: *De Reamer v. Pacific Express Co.*, 84 Mo. 529.

⁵ *Id.*; *Zulke v. Wing*, 20 Wis. 403; 91 Am. Dec. 425.

⁶ *Gilson v. Collins*, 66 Ill. 136.

⁷ *Wilder v. Stanley*, 49 Vt. 105.

⁸ *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647.

requesting his master to defend a suit for injuries occasioned by the servant's misconduct is liable for the costs and counsel fees therein.¹

§ 331. **Liability of Servant to Fellow-servant.**—A servant is liable to another servant engaged in the same general business for a common employer for injuries resulting to the latter from the negligence of the former in the discharge of his duties.² Thus where a road-master who had charge of all second hands directed one to bend a bar without heating it, as was usual, and as he had been told to do by his section-boss, and he was injured by so doing, it was held that the road-master was liable to the servant.³

¹ *Grand Trunk R. R. Co. v. Latham*, 63 Me. 177.

² *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 Ind. 547; 32 Am. Rep. 114; *Swainson v. Railroad Co.*, L. R. 3 Ex. Div. 341; *Griffiths v.*

Walfram, 22 Minn. 185; *Rogers v. Overton*, 87 Ind. 410; *contra*, *Albro v. Jaquith*, 4 Gray, 90; 64 Am. Dec. 56; overruled in *Osborne v. Morgan*, 130 Mass. 102; 39 Am. Rep. 437.

³ *Rogers v. Overton*, 87 Ind. 410.

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TITLE II.

CORPORATIONS.

PART I.—CORPORATIONS IN GENERAL, §§ 332-508

PART II.—BANKS, §§ 509-537.

PART III.—RAILROAD COMPANIES, §§ 538-569.

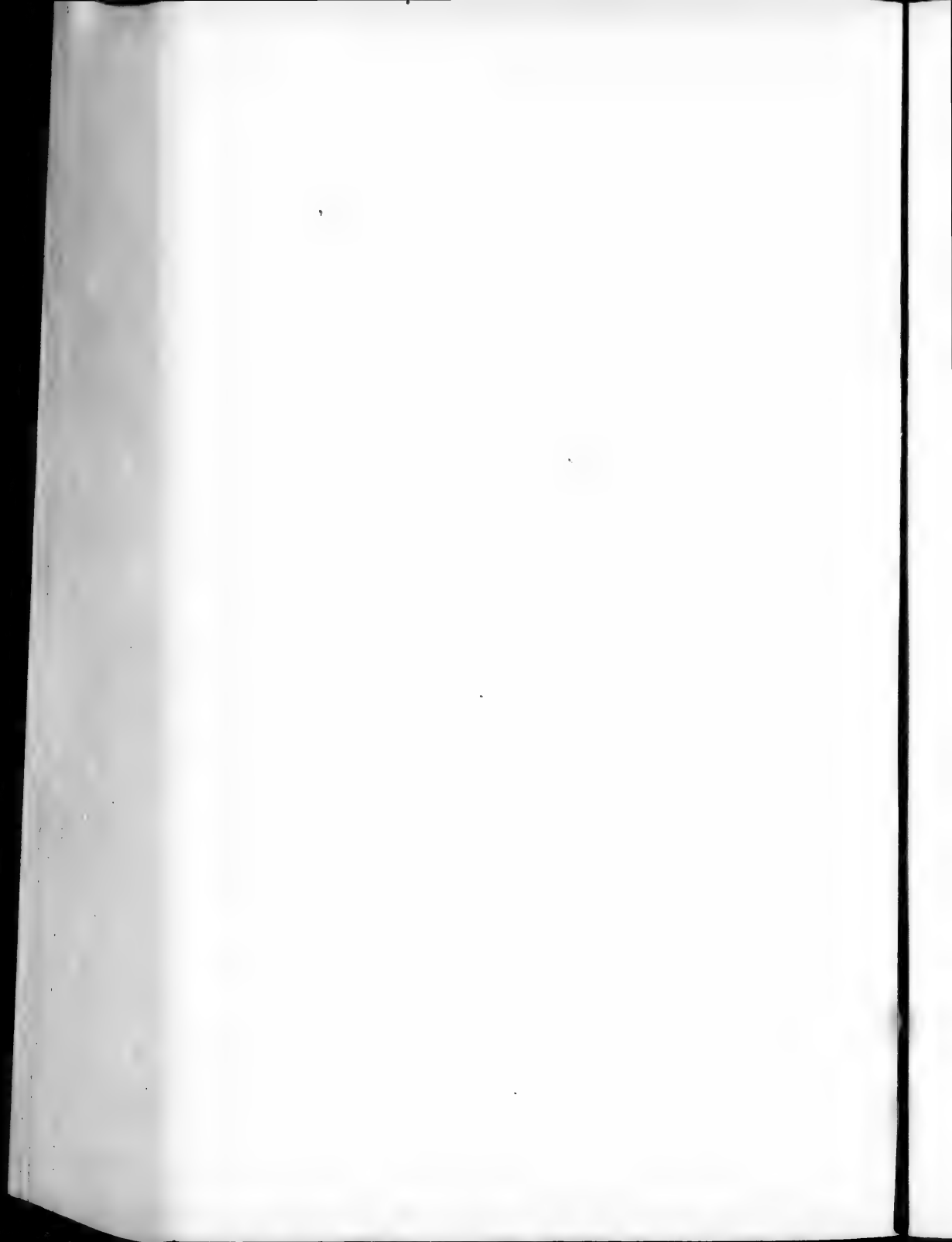
PART IV.—GAS COMPANIES, §§ 570-579.

PART V.—BUILDING AND LOAN ASSOCIATIONS,
§§ 580-593.

PART VI.—VOLUNTARY ASSOCIATIONS, §§ 594-607.

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TIONS, §§ 608-621.

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TITLE II.

CORPORATIONS.

PART I.—CORPORATIONS IN GENERAL.

CHAPTER XXIV.

THE FORMATION OF CORPORATIONS.

- § 332. Definition of corporation — The different classes of corporations.
- § 333. Corporation is created by state.
- § 334. Power of Congress to charter corporations.
- § 335. Delegation of power to create corporations.
- § 336. Form of grant of corporate franchises.
- § 337. Ratification by state of unauthorized corporation.
- § 338. Franchise must be accepted.
- § 339. Form of acceptance of grant.
- § 340. Incorporation under general laws — Procedure — Conditions precedent.
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- § 342. Corporations by prescription.
- § 343. Who may be corporators.
- § 344. Proof of incorporation, how made.
- § 345. Proof of performance of conditions precedent, how made.
- § 346. Foreign corporations — Grant of franchise cannot extend beyond limits of state.
- § 347. But foreign corporations are permitted by comity to do business.
- § 348. Subject to local laws.
- § 349. Citizenship of corporations within federal laws.
- § 350. Foreign corporations may be sued.
- § 351. Service of process on foreign corporations.

§ 332. Definition of Corporation — The Different Classes of Corporations. — A corporation is "an artificial being, invisible, intangible, and existing only in contemplation

of law."¹ It is "a natural person or body of persons upon whom has been conferred a distinct legal existence continued by succession and certain characteristic powers possessed and exercised independent of any changes of members. These characteristics are generally power to admit and remove members, to act by a common seal, to purchase, hold, and dispose of property, real and personal, to sue and be sued, and to make by-laws."² Corporations are either aggregate or sole. The former is a collection of individuals united into one body under a collective name. It is an artificial being created by law, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting within the scope of its charter as a natural person.³ A corporation sole consists of a single person who is made a body corporate and politic. In the American law the latter is not in use, and all corporations are corporations aggregate.⁴ Corporations are also public or private. Public corporations are such as are created for the discharge of public duties in the administration of civil government.⁵ Private corporations are such as are created for the advantage, benefit, or emolument of individuals.⁶ *Quasi* public corporations, those corporations are sometimes termed which have in view to promote some public work in which the public is interested, but for the private profit of the members, as railroad, turnpike, or canal

¹ *Dartmouth College v. Woodward*, 4 Wheat. 518.

² 1 *Abbott Law Dictionary*, 1, p. 290. A statute restraining any persons from doing certain acts restrains corporations: *People v. Utica Ins. Co.*, 15 Johns. 358; 8 Am. Dec. 243.

³ *Fietsam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492.

⁴ *Brunswick v. Dunning*, 7 Mass. 447; *Bank of Havana v. Wickham*, 7 Abb. Pr. 134; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Thomas v. Dakin*, 22 Wend. 9; *People v. Assessors*, 1 Hill,

616; *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Weston v. Hunt*, 2 Mass. 501.

⁵ *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Tinsman v. R. R. Co.*, 26 N. J. L. 148; *Ten Eyck v. Canal Co.*, 18 N. J. L. 200; 37 Am. Dec. 233; *School Commissioner v. Putnam*, 44 Ala. 566.

⁶ *Id.*; *Rundle v. Delaware Canal*, 1 Wall. Jr. 275; *Logwood v. Bank Minor*, 30; *Cleveland v. Stewart*, 3 Ga. 283.

companies.¹ Reclamation districts are public corporations;² so are levee districts;³ so is the establishment and maintenance of a wharf-boat and steam-elevator, for a general storage and forwarding business.⁴ An English joint-stock company, having the powers incident to a corporation, will be treated as a corporation in this country, although acts of Parliament declare that such companies are not corporations.⁵ School districts are *quasi* corporations.⁶ The term "franchise," in its legal sense, is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter.⁷

§ 333. **Corporation is Created by State.**—A corporation is the progeny of government,—it cannot form itself. In England the crown or Parliament may charter a corporation. In the different states of the United States the right to create corporations is usually given by the constitutions to the legislature,⁸ but this power is inherent there unless expressly withheld by the constitution.⁹ A corpo-

¹ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Riddle v. Proprietors*, 7 Mass. 169; 5 Am. Dec. 35; *Adams v. Bank*, 1 Me. 363; *School District v. Wood*, 13 Mass. 198; *Mower v. Leicester*, 9 Mass. 247; 6 Am. Dec. 63; *Bennett's Appeal*, 65 Pa. St. 212; *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637; 62 Am. Dec. 424; *Pierce v. Commonwealth*, 104 Pa. St. 150.

² *People v. Williams*, 56 Cal. 647.

³ *Dean v. Davis*, 51 Cal. 406.

⁴ *Glen v. Beard*, 35 La. Ann. 875.

⁵ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

⁶ *Gaskill v. Dudley*, 6 Met. 546; 39 Am. Dec. 750. See *post*, Division iv., *Municipal Corporations*.

⁷ *Fietz v. Hay*, 122 Ill. 293; 3

Am. St. Rep. 492. A corporation organized for the purpose of building a union depot for railroads, and of owning, maintaining, etc., different lines therefrom within the city limits, is not an ordinary railroad company: *People v. Cheeseman*, 7 Col. 376. Where the object of a corporation is to advance the private interests of land-owners in the incorporated district, although it may incidentally enhance the general prosperity of the whole community, it is nevertheless a private corporation: *Directors etc. v. Houston*, 71 Ill. 318.

⁸ *Stowe v. Flagg*, 72 Ill. 401; *McKim v. Odin*, 3 Bland, 417; *Aurora v. West*, 9 Ind. 74.

⁹ *Bank of Chenango v. Brown*, 26 N. Y. 467; *Briscoe v. Bank*, 11 Pet. 257; *Bell v. Bank, Peck*, 269; *Franklin Bridge Co. v. Wood*, 14 Ga. 80.

ration cannot be constituted by the mere agreement of parties.¹ It cannot be created by mere acquiescence, but only by an act of the legislature, or by some power thereto authorized by a legislative act.² In some of the states the constitution limits the power of the legislature to grant charters;³ as, for example, by prohibiting special charters.⁴ Such limitations are binding on the legislature, and restrict its inherent powers. And the legislature has no power to confer upon a corporation privileges or exemptions which it cannot constitutionally confer upon a private person. Therefore a provision in a charter, granting to a corporation the privilege of charging a greater rate of interest than the general laws allow, is unconstitutional and void.⁵ But although an act creating a corporation may be void as being within a constitutional prohibition of special acts for that purpose, yet it may operate as a legislative license or authority to the parties named to do what its language and intent authorize them to do.⁶ The legislature cannot charter a corporation whose object is to violate the laws of the United States; as, for example, an association formed to assist a rebellion against the national government.⁷ Where a corporation seeks to escape from the burdens imposed upon it by the legislature, clear evidence of the legislative assent to such exoneration is necessary.⁸

§ 334. Power of Congress to Charter Corporations.—

The power to charter corporations is not given to Congress by the United States constitution, but it nevertheless

¹ *Stowe v. Flagg*, 72 Ill. 397; *State v. Curtis*, 35 Conn. 374; 95 Am. Dec. 263.

² *Washington etc. R. R. Co. v. R. R. Co.*, 19 Gratt. 592; 100 Am. Dec. 711.

³ *Green v. Graves*, 1 Doug. 351.

⁴ *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

⁵ *Gordon v. Winchester Building etc. Ass'n*, 12 Bush, 110; 23 Am. Rep. 713.

⁶ *Brent v. State*, 43 Ala. 297.

⁷ *Trustees v. Satchwell*, 71 N. C. 111; *Chicora Co. v. Crews*, 6 Rich. 243. - A charter for a mutual marriage benefit association has been refused, its object being against public policy: *In re Mutual Aid Ass'n*, 15 Phila. 625; *In re Helping Hand Marriage Ass'n*, 15 Phila. 644.

⁸ *Braslin v. R. R. Co.*, 145 Mass. 64.

less exists in that body as an incident to the powers expressly given; and as a means for carrying out a federal purpose Congress may charter a corporation.¹

§ 335. Delegation of Power to Create Corporations.

—As a rule, a power to grant a charter cannot be delegated.² But, as in all cases of agency, mere ministerial duties may be delegated; as the issuing of the certificate;³ or ascertaining whether the objects of the association fall within the provisions of the law.⁴ It has been held that Congress may delegate to a territorial government the power to create corporations.⁵

§ 336. Form of Grant of Corporate Franchise.—Unless so required by the constitution, no formal terms are necessary in the grant of a corporate franchise. The use of the words "incorporate" or "corporation" is not even necessary.⁶ Any expression showing the intention of the

¹ *McCulloch v. Maryland*, 4 Wheat. 316; *Thomson v. R. R. Co.*, 9 Wall. 585; *Osborn v. Bank*, 9 Wheat. 738; *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29.

² *Morawetz on Corporations*, sec. 8. See *Bank of Chenango v. Brown*, 26 N. Y. 467.

³ *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *In re Deveaux*, 54 Ga. 673.

⁴ *In re Medical College*, 3 Whart. 456.

⁵ *Williams v. Bank*, 7 Wend. 539; *Vincennes University v. Indiana*, 14 How. 270.

⁶ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Warner v. Beers*, 23 Wend. 103; *People v. Assessors*, 1 Hill, 620; *Bow v. Allenstown*, 34 N. H. 351; 69 Am. Dec. 489. In *Thomas v. Dakin*, 22 Wend. 103, Cowen, J., says: "It has been impossible for me to see the force of the argument that, because the legislature have constantly avoided to call these associations, or any of their machinery, a corporation, therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they

so are in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the legislature expressly declare each of them to be corporations, without giving them corporate succession, or other artificial attributes, the declaration would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations would not change their character, provided they should in fact be clothed with all the essential powers of corporations. Suppose the legislature should attempt to create an ordinary safety-fund bank, with its usual machinery, by a majority vote: could the bank thus created maintain its ground merely because the statute might, in conclusion, declare that such bank should not be called or known as a corporation? The restrictive provision in the constitu-

legislature to be to grant a franchise is sufficient.¹ A grant of the power to perform corporate acts implies a grant of corporate powers.² An act of incorporation is not void because it omits to designate and limit the amount of capital stock, or prescribe the value and number of shares, or provide for the election of directors or administration of the affairs of the corporation in any mode other than may be found in the grant of "the usual rights and privileges of such corporations."³ Charters of private companies are to be construed strictly in favor of the state, but at the same time reasonably.⁴ Where such intent is not clear, no presumption of a corporate grant will arise.⁵ Where an act of incorporation expresses the conditions on which the grant of a franchise is to depend, other conditions cannot be inferred from the nature and objects of the grant.⁶ Where a statute recited that A had purchased property for educational purposes, and declared "that said institution is hereby incorporated under the name of Ward's Seminary for Young Ladies," it was held insufficient as an act of incorporation.⁷

§ 337. Ratification by State of Unauthorized Corporation.—A corporation formed without lawful authority may be legalized by the legislature. It may do this by simply recognizing it as a valid corporation.⁸ But a simple recital of its name in an act, with no intention of ratifying its existence, will not legalize it.⁹ By a subsequent

tion was leveled at the thing, not the name; at that species of legal being already known to the law as a corporation, not what the legislature might call so."

¹ Mahoney v. Bank, 4 Ark. 620.

² Commonwealth v. R. R. Co., 3 Grant Cas. 200.

³ Kirksey v. Plank Road Co., 7 Fla. 23; 68 Am. Dec. 427.

⁴ Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112; 84 Am. Dec. 527.

⁵ Gregory v. Shelby, 2 Met. (Ky.) 589; Myers v. Irwin, 2 Serg. & R. 368.

⁶ Cheraw etc. R. R. Co. v. White, 10 S. C. 155.

⁷ Nashville v. Ward, 16 Lea, 27.

⁸ Kanawha Coal Co. v. Kanawha etc. Co., 7 Blatchf. 391; McDougald v. Belamy, 18 Ga. 412; Society v. Pawlet, 4 Pet. 480; People v. Farnham, 35 Ill. 562; McAulay v. R. R. Co., 83 Ill. 348; Williams v. Union Bank, 2 Humph. 339; Bow v. Allenstown, 34 N. H. 351; 69 Am. Dec. 439.

⁹ Thornton v. R. R. Co., 123 Mass. 32; Green v. Seymour, 3 Sand. Ch. 285.

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legislative ratification, the acts done before by the corpora-
tion become as valid and binding as if previous authority
had been given.¹ The requirement that an application
be filed with the secretary of state, and acknowledged
before a proper officer, may be waived by the state by a
subsequent statute recognizing the existence of a corpo-
ration organized without compliance with said require-
ment.²

§ 338. Franchise must be Accepted.—A person cannot
be made a corporator without his consent.³ In like man-
ner a grant of a corporate franchise does not become effec-
tive until it is accepted by the grantees,⁴ and no right
can be claimed under it until it is accepted.⁵ A grant is
an offer which may be withdrawn by the legislature at any
time before it is accepted by the grantees,⁶ and if not ac-
cepted within a reasonable time it will expire.⁷ A statute
granting new franchises to an existing corporation upon
specified conditions is inoperative until it is accepted.⁸
Where an act of incorporation is accepted, and the com-
pany organized provisionally thereunder, no subsequent
withdrawal of any of the corporators will affect its valid-
ity.⁹ It must be accepted as offered; the grantees cannot
add new terms to it.¹⁰ It can only be accepted by the
grantees.¹¹ But a majority of an association may accept
a franchise on behalf of all.¹²

¹ Illinois etc. R. R. Co. v. Cook, 29
Ill. 237; Goodrich v. Reynolds, 31 Ill.
490; 83 Am. Dec. 240; Basshor v. Dres-
sel, 34 Md. 503; St. Louis etc. R. R.
Co. v. R. R. Co., 2 Mo. App. 69.

² Central Agricultural Mechanical
Ass'n v. Alabama Gold Life Ins. Co.,
70 Ala. 120.

³ Lauman v. R. R. Co., 30 Pa. St.
46; 72 Am. Dec. 685; Ellis v. Mar-
shall, 2 Mass. 269; 3 Am. Dec. 94;
Lexington etc. R. R. Co. v. Chandler,
13 Met. 315.

⁴ Lincoln etc. Bank v. Richardson,
1 Greenl. 79; 10 Am. Dec. 34.

⁵ Green v. Seymour, 3 Sand. Ch.
285.

⁶ State v. Dawson, 16 Ind. 40; Ches-
apeake Canal Co. v. R. R. Co., 4 Gill
& J. 1.

⁷ State v. Bull, 16 Conn. 179.

⁸ Lyons v. R. R. Co., 32 Md. 18.

⁹ Busey v. Hooper, 35 Md. 15; 6
Am. Rep. 350.

¹⁰ King v. Westwood, 2 Dow & C.
21; R. v. Amery, 1 Term Rep. 589.
Lyons v. R. R. Co., 32 Md. 18.

¹¹ R. v. Amery, 1 Term Rep. 589.

¹² St. Paul Sons of T. v. Brown, 11
Minn. 356.

ILLUSTRATIONS.—Corporators met and by resolution accepted the charter, elected officers, authorized contracts, and the stock was all subscribed for. *Held*, that "the charter was in operation," within the meaning of the Illinois constitution: *McCartney v. R. R. Co.*, 112 Ill. 611; and see *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128. A voluntary association became incorporated by an act of the legislature, and a majority of the members accepted the charter. *Held*, that a member who had united in the application for a charter, and had expressed no dissent thereto, could not repudiate it, though he was not present at the organization under the charter: *Ferris v. Strong*, 3 Edw. Ch. 127. A charter was granted by the legislature of North Carolina. The corporation held their first meeting in Maryland, and accepted the charter: *Held*, an invalid acceptance: *Smith v. Silver Valley Mining Co.*, 64 Md. 85; 54 Am. Rep. 760.

§ 339. Form of Acceptance of Grant.—No particular form of acceptance is essential. An intention on the part of the grantees to accept is enough.¹ Where persons apply for a charter and it is granted, acceptance of it by them is presumed;² so, too, parties are presumed to have

¹ *Bank v. Dandridge*, 12 Wheat. 71; *American Bridge Co. v. Bragg*, 11 N. H. 102; *Smead v. Railroad Co.*, 11 Ind. 104; *Covington v. Covington Bridge*, 10 Bush, 70; *Penobscot Co. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Blanford v. Gibbs*, 2 Cush. 39. In *Middlesex v. Davis*, 3 Met. 137, the court say: "It is true that it does not appear by the records of the society that the act of incorporation has been accepted by an express vote to that effect; nor does it appear in what manner the first meeting of the corporation was called. But the presumptive proof, both of the acceptance of the act of incorporation and of the legal organization of the society, is exceedingly strong, and quite as satisfactory as direct evidence. That such presumptive evidence is admissible and proper, is fully maintained by the decisions in *Dedham Bank v. Chickering*, 3 Pick. 335; and in *Bank of United States v. Dandridge*, 12 Wheat. 71; and by the numerous authorities cited in the latter case. By these authorities it is now well settled, whatever may have been the ancient doctrine as

to corporations, that as the acts of private persons, even of the most solemn nature, may be presumed or proved by presumptive evidence, so as to the acts of a corporation, if they cannot be reasonably accounted for but on the supposition of other acts done to make them legally operative and binding, they are presumptive proofs of such other acts. Thus, as deeds and grants to private persons, which are beneficial to them, are presumed to have been accepted, so also may the acceptance of an act or charter of incorporation, beneficial to the corporation, be presumed for the like reason. And a long lapse of time, and the continued exercise of the corporate powers granted to a corporation, sufficiently justify the presumption of the acceptance of the charter. So if a particular charter is applied for, and it is granted, the acceptance may be presumed from such previous application."

² *Middlesex v. Davis*, 3 Met. 137; *Atlanta v. Gas Light Co.*, 71 Ga. 106; *Astor v. R. R. Co.*, 48 Hun, 562.

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accepted a grant beneficial to them.¹ The question of the acceptance of an act of incorporation is for the jury.² A charter granted to certain persons therein named is presumed to have been granted at their instance, and to have been accepted by them; but such presumption is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date.³ Though it is optional with members of a private corporation whether they will take the benefit of their charter, yet after they have made their election by executing the powers granted, the duties and liabilities attach which the charter imposes.⁴ Acceptance of a charter may be shown by the expenditures and other transactions in furtherance of the purpose thereof, without proof of any formal organization by meeting, election, etc.⁵ It is not essential that the records of the corporation should show a formal acceptance of the act by the persons incorporated.⁶ A company, by accepting a charter, becomes bound by all its provisions, and cannot insist that the enactment of any provision therein was fraudulently obtained.⁷ Exercise by a corporation of a power granted by an amendment to its charter raises a presumption of an acceptance of the amendment.⁸ Where a corporation, which is already in existence, and acting under a former charter or prescription or usage, accepts a new charter before the expiration of the old, the corporation may still act under the former, or partly under both.⁹

¹ *Bank v. Dandridge*, 12 Wheat. 71, and cases *supra*; *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Tal-ladega Ins. Co. v. Landers*, 43 Ala. 115.

² *Hammond v. Straus*, 53 Md. 1.

³ *Newton v. Carberry*, 5 Cranch C. C. 632.

⁴ *Riddle v. Proprietors of Locks etc.* on Merrimack River, 7 Mass. 184; 5 Am. Dec. 35; *Goshen Turnpike v. Sears*, 7 Conn. 86; *Commonwealth v. Worcester Turnp. Corp.*, 3 Pick. 327.

⁵ *McKay v. Beard*, 20 S. C. 156.

⁶ *Russell v. McLellan*, 14 Pick. 63.

⁷ *Bushwick and Newton Bridge Co. v. Ebbets*, 3 Edw. Ch. 353.

⁸ *Wetumpka etc. R. R. v. Bingham*, 5 Ala. 658; *Palfrey v. Paulding*, 7 La. Ann. 363; *Bangor etc. R. R. Co. v. Smith*, 47 Me. 34; *Smead v. R. R. Co.*, 11 Ind. 104.

⁹ *Woodfork v. Union Bank*, 3 Cold. 488.

ILLUSTRATIONS.—A statute, in addition to a former act creating a corporation for the management of a trust fund, was passed without the knowledge or request of the corporation, and was never adopted by any direct vote, but the corporation elected certain officers, provided for by the act in addition, who exercised the powers conferred on them for ten years. *Held*, sufficient evidence of a formal assent and adoption by the corporation: *Third School District in Blandford v. Gibbs*, 2 Cush. 39. A statute was drawn up by the attorney of an insurance company, and passed upon the application of a portion of the directors, and afterwards recognized by the board of directors in various ways. *Held*, that it would be presumed to have been accepted by the corporation: *Sumrall v. Sun Mut. Ins. Co.*, 40 Mo. 27. The same persons composed two corporations, and passed a vote, as members of one of them, proposing to enter into a contract with the other, and the conditions of such proposal were partially executed by both corporations, without any corporate vote on the subject. *Held*, to constitute an acceptance of the proposal: *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 297.

§ 340. Incorporation under General Laws—Procedure—Conditions Precedent.—By the constitutions of most of the states, the legislature is forbidden to create corporations by special charter. Under such general corporation laws, the right to form a corporation is extended to all persons who comply with certain prescribed conditions.¹ A substantial compliance with these conditions precedent is generally deemed sufficient.² Such an irregularity as the failure of the notary to certify that those signing the articles of incorporation were personally known to him, is not fatal.³ In Iowa the filing of the articles of incorporation in the office of the secretary of state is not essential.⁴ In Nebraska and Arkansas the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise.

¹ The charter of a private corporation organized under a general law is as inviolable as that of one organized under a special act: *People v. Keese*, 27 Hun, 483.

² Morawetz on Corporations, sec. 17;

Mokelumne Co. v. Woodbury, 14 Cal. 424; 73 Am. Dec. 658.

³ *People v. Cheeseman*, 7 Col. 376.

⁴ *First Nat. Bank of Davenport v. Davies*, 43 Iowa, 424; and see *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54.

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The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company.¹ In Kansas a corporation is created when the certificate of incorporation is filed with the secretary of state.² The Nebraska act does not authorize corporations formed under it to commence business before the whole capital stock has been subscribed.³ In Kentucky the statutory requirements of published notice of names of incorporators, amount of stock, etc., must be complied with.⁴ In Indiana the articles must specify the objects of such association in strict accordance with the statute.⁵ In California articles of incorporation must state that a majority of the members of the association were present and voted at the election of directors.⁶ A defect in the certificate of incorporation of a company incorporated under a general statute is cured by a legislative recognition of such corporation.⁷ If a corporation is illegally formed, the stockholders are not relieved from individual liability by the good faith of the incorporators, or the actual transaction of business by the corporation.⁸ The neglect of the trustees of a religious society to make the record of its certificate of incorporation that the statute requires, does not preclude the society from proving its corporate existence by evidence of acts of user.⁹ A requirement that one half the capital stock of a corporation should be actually paid in money is substantially complied with if the corporation has received property whose market value is greater

¹ *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Garnett v. Richardson*, 35 Ark. 144; and see *Bigelow v. Gregory*, 73 Ill. 197.

² *Hunt v. Kansas Missouri Bridge Co.*, 11 Kan. 412; *St. Louis etc. R. R. Co. v. Tiernan*, 37 Kan. 607.

³ *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

⁴ *Heinig v. Adams and Westlake Mfg. Co.*, 81 Ky. 300.

⁵ *West v. Bullskin Prairie Ditching Co.*, 32 Ind. 138; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

⁶ *People v. Selfridge*, 52 Cal. 331.

⁷ *Basshor v. Dressel*, 34 Md. 503.

⁸ *Kaiser v. Lawrence Savings Bank*,

56 Iowa, 104; 41 Am. Rep. 85.

⁹ *Washington Baptist Church v. R. R. Co.*, 5 Mackey, 269.

than the par value of the stock.¹ Under such a statute, the subscriptions must have been made in good faith by persons having a reasonable expectation of being able to pay.² Articles of association are properly signed although only the initial letter of christian names is used.³

Under a constitution which provides that corporations may be formed under general laws only, the legislature is restricted not only from creating, in the strict sense of the term, a business corporation by a special act, but also from conferring by a special act any powers or franchises upon a corporation.⁴ So the mere recognition of a corporate body as an existing corporation in acts of the legislature cannot operate to give the organization validity.⁵ The failure of the corporation to file its articles of incorporation in the county in which it owns property, as required by statute, does not prevent it from defending an action for work and labor done on said property.⁶ The certificate of incorporation is made for the benefit of the public, and not for the corporation or its stockholders; and those who participated in the incorporation, and by a certificate made in pursuance of the statute announced the amount of the capital stock of the corporation, cannot, as against its creditors, contradict the certificate.⁷

ILLUSTRATIONS.—The language of the charter of a railroad corporation imported an immediate grant. A proviso required the commencement of operations within a specified time. *Held*, that no condition precedent was created by the proviso: *Cheraw etc. R. R. Co. v. White*, 14 S. C. 51. A railroad company was created "a body politic and corporate." A subsequent section of the charter enacted "that when one hundred thousand dollars shall have been subscribed, and one dollar on each share shall have been paid in, the said company may organize and proceed

¹ *State v. Wood*, 84 Mo. 378; 13 Mo. App. 139.

² *Holman v. State*, 105 Ind. 569.

³ *State v. Beck*, 81 Ind. 500.

⁴ *City of San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

⁵ *Oroville etc. R. R. Co. v. Plumas County*, 37 Cal. 354.

⁶ *Weeks v. Garibaldi etc. Co.*, 73 Cal. 599.

⁷ *Thompson v. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797.

to work." *Held*, that this requirement was sufficiently complied with when one hundred thousand dollars was subscribed, and a sum in gross paid in equal to one dollar upon every share subscribed: *Spartanburg etc. R. R. Co. v. Ezell*, 14 S. C. 281. A rifle club was organized under the law providing for the creation of corporations for "literary, scientific, and charitable purposes." *Held*, that the object of the association was not within the purview of the law, and that rifle-shooting was not a science, though it might be an art: *Vredenburg v. Behan*, 33 La. Ann. 627.

§ 341. Conditions Precedent to Grant—Performance when Necessary.—Where the grant is subject to the performance of certain conditions before the grantees can form the corporation, those conditions precedent must be complied with or the corporation is not legal.¹ But where the performance of certain conditions is only a prerequisite to the right of the corporation to carry on business after it is formed, a failure to perform those conditions does not affect the existence of the corporation.² If all the requirements of the charter are observed, although not in the order prescribed, the organization is sufficient.³ When a charter is granted, and the corporation is to be brought into existence by some future acts of the incorporators, the franchises or property which the charter grants to the body remain in abeyance until such acts are done.⁴

ILLUSTRATIONS.—A provision in a conveyance of real estate, that part of the purchase price should be paid when a certain contemplated corporation should be organized, *held*, not to require an organization of the corporation strictly in accordance with the statutory requirements, before the amount should become due, but to be satisfied by signing the certificate of incorporation, adopting by-laws, electing officers, and other acts effecting a *de facto* organization: *Childs v. Smith*, 46 N. Y. 34. The legislative charter of a religious corporation being about to

¹ *People v. Chambers*, 42 Cal. 201; 142; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

² *Harrod v. Hamer*, 32 Wis. 162; ³ *Eakright v. R. R. Co.*, 13 Ind. 404. *City Hotel v. Dickinson*, 6 Gray, 593; ⁴ *Dartmouth College v. Woodward*, *Central Tp. Co. v. Valentine*, 10 Pick. 4 Wheat. 518, 691.

expire, due application for a renewal was made to the clerk. Without the fault of the corporation there was delay in granting the renewal. *Held*, that when granted it related back so as to prevent a reverter of property: *St. Phillips Church v. Zion Pres. Church*, 23 S. C. 297.

§ 342. **Corporations by Prescription.**—Public corporations may exist by prescription; that is to say, after a certain length of time a grant to them will be presumed, although it cannot be found.¹ But there is no such rule in favor of a private corporation.² If the acts and proceedings of a company or association, of however long standing, consist only of such as it is competent for individuals to perform without an incorporating act, a grant of such an act cannot be inferred.³

§ 343. **Who may be Corporators.**—Any person capable of contracting may be a corporator. So may infants, married women, and persons *non compos mentis* become stockholders by transfer or by inheritance. A corporation may be a stockholder in another corporation, and so may a state or a municipality.⁴

§ 344. **Proof of Incorporation, how Made.**—That a body is a corporation is proved by showing the grant of the charter and its acceptance. Of public laws only will the courts take judicial notice.⁵ The legality of the existence of a corporation is presumed.⁶ A private domestic corporation must, like a foreign corporation, aver and prove the fact of its incorporation.⁷ The rule that the

¹ *Jameson v. People*, 16 Ill. 237; 63 Am. Dec. 304; *Bow v. Allentown*, 34 N. H. 351; 69 Am. Dec. 489; *Robie v. Sedgwick*, 35 Barb. 326; *Dillingham v. Snow*, 5 Mass. 547; *Sherwin v. Bugbee*, 16 Vt. 439; *Londonderry v. Andover*, 28 Vt. 416; *New Boston v. Dunbarton*, 15 N. H. 201; *All Saints Church v. Lovett*, 1 Hall, 191.

² *Morawetz on Corporations*, sec. 22. But see *Greene v. Dennis*, 6 Conn. 293; 16 Am. Dec. 55; *Selma etc. R. R. Co.*

v. Tipton, 5 Ala. 787; 39 Am. Dec. 344.

³ *Greene v. Dennis*, 6 Conn. 302; 16 Am. Dec. 58.

⁴ *Morawetz on Corporations*, sec. 21.

⁵ *Morawetz on Corporations*, sec. 23; *Merchants' Bank v. Harrison*, 39 Mo. 433; 93 Am. Dec. 285.

⁶ *Hagerstown Co. v. Creeger*, 5 Har. & J. 122; 9 Am. Dec. 495; *Busey v. Hooper*, 35 Md. 15; 6 Am. Rep. 350.

⁷ *Holloway v. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68.

existence of a corporation may be proved by producing its charter and showing acts of user under it has no application to a corporation formed under the provisions of a general statute, requiring certain acts to be performed before the corporation can be considered *in esse*, or its transactions possess any validity.¹ Proof of user or corporate acts makes a *prima facie* case of the entity or identity of a corporation.² Where a body professing to be a corporation has been dealt with expressly as such, those who have so dealt with it cannot question its corporate existence for the purpose of charging its members individually as if they were partners.³ A body sued as a corporation is not estopped from denying its corporate existence by reason of having done acts which might have been done equally well by an unincorporated body.⁴ A copy of the articles of association of a corporation, filed in the county recorder's office, when officially certified to as a full, true, and complete copy from the record, is admissible as evidence of the original articles which have been lost.⁵ A charter granted by a sister state or a foreign country is proved like other foreign laws.⁶ A copy of an act to incorporate a foreign corporation, to which is appended the certificate of the secretary of the state of such corporation with the seal of the state affixed, is admissible to show the business of the corporation.⁷ Where a corporation sues in a federal court, it need not prove its corporate existence, where defendant has pleaded the general issue only.⁸ The corporate existence is not admitted from the mere fact that one dealing with it has, in a contract with the company, designated it by a name appropriate to a corporate

¹ Mokolunne Hill Min. Co. v. Woodbury, 14 Cal. 424; 73 Am. Dec. 658.

² Derrenbacher v. R. R. Co., 21 Hun, 612; 59 How. Pr. 283; St. Paul Ins. Co. v. Allis, 24 Minn. 75.

³ Merchants' Bank v. Stone, 38 Mich. 779.

⁴ Kirkpatrick v. Keota United Presbyterian Church, 63 Iowa, 372.

⁵ Walker v. Shelbyville and Rushville Turnpike Co., 80 Ind. 452.

⁶ United States Bank v. Stearns, 15 Wend. 314; Society v. Young, 2 N. H. 310; State v. Carr, 5 N. H. 367.

⁷ Pacific Guano Co. v. Mullen, 66 Ala. 582.

⁸ Union Cement Co. v. Noble, 15 Fed. Rep. 502.

body, unless it is distinctly stated in the contract that it is an incorporated company. Such designation admits only the existence of an association acting under that name.¹

ILLUSTRATIONS.—In a suit on a contract, the question of the corporate existence of a company came up collaterally. *Held*, that as it was only necessary to prove that the company assumed to act as a corporation, the duly identified book of records, showing organization and acts thereunder, was competent evidence on that point: *Reynolds v. Myers*, 51 Vt. 444. On a trial a deed of trust, issued under its corporate seal to secure the plaintiff's debt, and reciting that the corporation had been organized in pursuance of law, was introduced. *Held*, admissible to prove the defendant's legal existence as a corporation: *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

§ 345. Proof of Performance of Conditions Precedent—How Made.—That conditions precedent have been duly performed may be proved by the books and records of the company.²

§ 346. Grant of Corporate Franchise cannot Extend beyond Limits of State.—A state cannot grant a franchise outside of its territorial limits, and therefore the grant of a privilege of acting in a corporate capacity cannot extend into a foreign state or country.³ The

¹ *Holloway v. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68.

² *Grant v. Coal Co.*, 80 Pa. St. 208; *Wood v. Jefferson Bank*, 9 Cow. 194; *Penobscot R. R. Co. v. Dunn*, 39 Me. 588; *Ryder v. Alton*, 13 Ill. 523; *Hill v. Carey*, 5 Ga. 239; *Duke v. Navigation Co.*, 10 Ala. 82; *Mokelumne Mining Co. v. Woodbury*, 14 Cal. 424; 73 Am. Dec. 658, the court saying: "The general rule is, that the existence of a corporation may be proved by producing its charter, and showing acts of user under it, but this rule has no application to a corporation formed under the provisions of a general statute, requiring certain acts to be performed before the corporation can be considered *in esse*, or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing at least a substantial com-

pliance with the requirements of the statute. But there is a broad and obvious distinction between such acts as are declared to be necessary steps to the process of incorporation, and such as are required of the individual seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of a corporation, and may be taken advantage of, collaterally, in any form which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter."

³ *Bank of Augusta v. Earle*, 13 Pet. 588; *Paul v. Virginia*, 8 Wall. 181; *Clarke v. Bank*, 10 Ark. 516; 52 Am.

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residence of a corporation is in the state which created it, and in the place where its principal office is.¹ The members of a foreign corporation, where it sues or is sued in a United States court, are conclusively presumed to be citizens of the state or country which created it.² A national bank located in New York is a domestic, not a foreign, corporation, and may sue as such.³ A corporation does not, by purchasing and operating property in another state, under enabling acts of that state, become a corporation of that state.⁴ In New York a corporation created by the laws of that state is deemed a resident thereof, although the bulk of its property and business lies in a foreign state.⁵ When the charter of a corporation in one state is duplicated in another state, and the

Dec. 248; *Allegheny v. R. R. Co.*, 51 Pa. St. 228; 88 Am. Dec. 579; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287; 92 Am. Dec. 688; *Phoenix Ins. Co. v. Com.*, 5 Bush, 68; 96 Am. Dec. 331. A court may enjoin it without intrusting property in litigation to the custody of a non-resident, under circumstances indicating an intention to remove it for keeping or management outside of the state: *Matthews v. Theological Seminary*, 2 Brewst. 541. In *Miller v. Ewer*, 27 Mo. 509, 45 Am. Dec. 619, the court say: "There are a variety of corporations. It will only be necessary on this occasion to speak of one class of them, corporations aggregate, composed of natural persons. It is often stated in the books that such a corporation is created by its charter. This is not precisely correct. The charter only confers the power of life, or the right to come into existence, and provides the instruments by which it may become an artificial being, or acting entity. Such a corporation has been well defined to be an artificial being, invisible, intangible, and existing only in contemplation of law. The instruments provided to bring the artificial being into life and active operation are the persons named in the charter, and those who, by virtue of its provisions, may become associated with them. Those persons or corporations,

as natural persons, have no such power. The charter confers upon them a new faculty for this purpose; a faculty which they can have only by virtue of the law which confers it. That law is inoperative beyond the bounds of the legislative power, by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it, and they cannot possess or exercise it there, — can have no more power there to make the artificial being act than other persons not named or associated as corporators, — any attempt to exercise such a faculty there is merely a usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void."

¹ *Sangamon R. R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497.

² *National S. S. Co. v. Sugman*, 106 U. S. 118.

³ *Market Bank v. Pacific Bank*, 64 How. Pr. 1.

⁴ *Wilkinson v. R. R. Co.*, 22 Fed. Rep. 353.

⁵ *Crowley v. R. R. Co.*, 30 Barb. 99; *Inter. Life Ass. Co. v. Sweetland*, 14 Abb. Fr. 240.

legislature assumes to create a home corporation, the effect is to consolidate the two; but for purposes of jurisdiction it is a separate corporation within the state of its adoption.¹ A railroad corporation chartered in Indiana, with authority to own and manage property in Ohio, is not thereby empowered to change its domicile to that state.² A corporation chartered by two states by the same name and style, clothed with the same powers, and intended to accomplish the same objects, fulfilling the same duties in both states, is a distinct and separate body in each state.³ The new corporation resulting from the consolidation of a domestic and a foreign corporation is a domestic corporation.⁴

ILLUSTRATIONS. — A New York corporation was authorized by its charter to hold real estate and to act as trustee, and was appointed by a New York court trustee under the will of a citizen of that state. *Held*, that it had no power to hold real estate of the testator in Illinois: *United States Trust Co. v. Lee*, 73 Ill. 142; 24 Am. Rep. 236. A foreign corporation took a mortgage on lands in New Jersey, to secure a loan already made to the mortgagor on stock collateral, which became depreciated. *Held*, that although its charter may not have authorized the taking of a mortgage in another state as an original investment, yet the corporation might take such mortgage by way of additional security: *National Trust Co. v. Murphy*, 30 N. J. Eq. 408.

§ 347. But by Comity Foreign Corporations are Permitted to do Business.—But by the comity of states, corporations chartered by foreign states are permitted to carry on their business and operations within the powers granted by their charters in states outside the state which chartered them.⁵ Acts done by a corporation out of the state which created it, unless forbidden by its charter or the laws of the state in which it may attempt to act, are

¹ *Blackburn v. R. R. Co.*, 12 Flip. 525.

² *Aspinwall v. R. R. Co.*, 20 Ind. 492; 83 Am. Dec. 329.

³ *County of Allegheny v. R. R. Co.*, 51 Pa. St. 228; 88 Am. Dec. 579.

⁴ *In re St. Paul etc. R. R. Co.*, 36 Minn. 85.

⁵ *Bank of Augusta v. Earle*, 13 Pet. 519; *Christian Union v. Yount*, 101 U. S. 356; *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522; *Cowell v. Colorado Springs Co.*, 100 U. S. 55.

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valid.¹ But the state in giving this permission may annex such conditions thereto as it wishes.² A Texas law, recognizing the existence of a corporation organized under Kansas law, and conferring on it within Texas the same rights and powers as are granted it by Kansas, within its territory, but not purporting to create a new corporate body, does not make it a corporation or citizen of Texas.³ A railroad corporation organized by the legislature of one state, but having portions of its line in a second state, will be considered a corporation of the second state so far as to be amenable to its laws.⁴ So one incorporated in Maryland, but leasing and operating a railroad in Virginia, is subject to suit in Virginia, and is not entitled to a removal of the cause to the federal court.⁵ A federal court cannot interfere to prevent the organization of a corporation bearing the same name as that of a foreign corporation doing business in the state.⁶ The effect of an omission to comply with the requirements of a statute, prescribing terms on which foreign corporations may do business within the state, is not to avoid the contracts which agents of the corporation may make, but to preclude enforcing such contracts until the statute has been complied with.⁷ Soliciting and receiving subscriptions for a newspaper published by a corporation in another state is not "doing business" in the state.⁸ The right of a foreign corporation to do business in a state can only be questioned by the state itself.⁹ A corporation, though doing no business in the state where it is

¹ *New York Floating Derrick Co. v. New Jersey Oil Co.*, 3 Duer, 648; *Mumford v. American Life Ins. etc. Co.*, 4 N. Y. 463; *Bard v. Poole*, 12 N. Y. 495.

² *State v. Lathrop*, 10 La. Ann. 398; *Erie R. R. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226.

³ *Missouri etc. R. R. Co. v. R. R. Co.*, 4 Woods, 360.

⁴ *McGregor v. R. R. Co.*, 35 N. J. L. 115.

⁵ *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384.

⁶ *Lehigh Valley Coal Co. v. Hamblen*, 23 Fed. Rep. 225.

⁷ *Wood Mowing etc. Co. v. Caldwell*, 54 Ind. 270; 23 Am. Rep. 641. But see *In re Comstock*, 3 Saw. 218.

⁸ *Beard v. Union and American Publishing Co.*, 71 Ala. 60.

⁹ *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150.

organized, may hold and deal in land in another state.¹ A foreign corporation may buy at execution sales on judgments in its favor,² or may acquire land in satisfaction of a debt due to it.³ So foreign corporations may sue one another if both are doing business within the state, and the cause of action accrued there.⁴ A foreign corporation cannot purchase and hold real estate in Illinois beyond what is necessary for the transaction of its business, or the collection of its debts, either for its own benefit or in trust for others.⁵

ILLUSTRATIONS.—A company was incorporated under the laws of Pennsylvania, and its charter provided that it might do business anywhere, "except in the state of Pennsylvania." *Held*, that it could not do business in Kansas: *Land Grant etc. Co. v. Coffey County*, 6 Kan. 245. A railroad corporation chartered in Connecticut bought the franchises and property of a railroad corporation created under the laws of Connecticut and Rhode Island. The Rhode Island legislature ratified the sale, and authorized the former company to exercise the rights thus acquired. *Held*, that the company thus became the successor of the former company, and a Rhode Island corporation: *Clark v. Barnard*, 108 U. S. 436.

§ 348. **Subject, however, to Local Laws.**—But its charter can give the foreign corporation no power to do acts forbidden by the laws of the country which it has entered.⁶ So a corporation which cannot take real estate by devise in its own state cannot take by devise in another state.⁷ A corporation created in Connecticut for the sole purpose of buying and selling lands cannot buy and sell or hold in perpetuity lands in Illinois.⁸ A foreign insur-

¹ *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

² *Elston v. Piggott*, 94 Ind. 14.

³ *Columbus Buggy Co. v. Graves*, 108 Ill. 459; see *Thompson v. Waters*, 25 Mich. 214; 12 Am. Rep. 243.

⁴ *Emerson v. McCormick Harvesting Machine Co.*, 51 Mich. 5; *Thompson v. Waters*, 25 Mich. 211; 12 Am. Rep. 243.

⁵ *United States Trust Co. v. Lee*, 73 Ill. 142; 24 Am. Rep. 236.

⁶ *M. Inor v. Railroad Co.*, 53 N. Y. 363; *Bard v. Poole*, 12 N. Y. 505; *Stetson v. Bank*, 2 Ohio St. 174; *Lewis v. Bank*, 12 Ohio, 132; 40 Am. Dec. 469; *Bank v. Earle*, 13 Pet. 539; *Blair v. Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129; *People v. R. R. Co.*, 48 Barb. 478.

⁷ *Starkweather v. Am. Bible Soc.*, 72 Ill. 50; 22 Am. Rep. 133.

⁸ *Carroll v. East St. Louis*, 67 Ill. 568; 16 Am. Rep. 632.

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ance company cannot, without first complying with the state laws enacted for its regulation, make contracts which it may enforce; and where the company fails to file the statement of its condition and the consent of the auditor to transact business within the state, as required by law, the company cannot recover on a note given in such state for stock and premiums, notwithstanding the law imposes a penalty for doing business in such state in violation of its provisions.¹ A prohibition against foreign corporations doing business in the state, without having a known place of business therein, and an agent on whom process may be served, does not prohibit a single contract of sale by a foreign corporation to a citizen of the state, and the maintenance of an action in the state by the corporation for a breach of the contract.² Comity cannot extend to the point of granting to a foreign corporation privileges which its charter does not permit it to exercise; and in applying for privileges, it must show that it has power to exercise them.³ In a suit by a foreign corporation, it must show not only the papers and proceedings of incorporation, but the statute of the state where it was incorporated, authorizing such incorporation.⁴

ILLUSTRATIONS.—A Maryland corporation is authorized by its charter to take and receive devises. A devise is made to it in New York, but by the laws of New York devises to corporations are not legal. *Held*, that the corporation cannot take: *White v. Howard*, 46 N. Y. 144. A corporation is authorized by its charter to charge on its loans a rate of interest which by the laws of the state of B is usurious. *Held*, that it cannot charge that rate in the state of B: *Hitchcock v. Bank*, 7 Ala. 435. A corporation by its charter was prohibited from lending money at a rate of interest exceeding the legal rate. It lent money in another state at a rate of interest which, although legal there, was higher than the legal rate in the state of its incorporation. *Held*, within its powers: *United States Mortgage Co. v. Sperry*, 24 Fed. Rep. 838. A statute required agents of foreign corpo-

¹ *Cincinnati etc. Assur. Co. v. U. S.* 727; *Sherwood v. Alvis*, 83 Ala. 115; 3 Am. St. Rep. 695.
² *Match Co. v. Powers*, 51 Mich. 145.
³ *Cooper Mfg. Co. v. Ferguson*, 113
⁴ *Savage v. Russell*, 84 Ala. 103.

rations to file in certain offices evidence of their appointment, and of their authority to accept service of process for the corporation, and imposed a penalty on them for failing so to do; and provided that no such corporation should enforce a contract made with its agents before compliance with the act. *Held*,—1. That the act did not apply to the agent of a foreign corporation engaged in manufacturing a patented article; and 2. That the act did not avoid contracts so made, but only suspended the remedy on them until the act was complied with: *Walter A. Wood Mowing Machine Co. v. Caldwell*, 54 Ind. 270; 23 Am. Rep. 641. A statute required foreign insurance companies, as a condition precedent to receiving a license to do business in the state, to agree not to remove into the United States courts any actions brought against them in the state courts; and enacted that on violation of such agreement by an insurance company it should "be the imperative duty of the secretary of state to revoke its license." *Held*,—1. That the statute was constitutional; and 2. That the secretary might be compelled to revoke the license by *mandamus* at the relation of any person interested: *State v. Doyle*, 40 Wis. 175; 22 Am. Rep. 692.

§ 349. Citizenship of Corporations within Federal Laws.—The constitution of the United States provides that the judicial power of the United States shall extend to "controversies between citizens of the different states," and that the laws made in pursuance of the constitution shall be the supreme law of the land. The judiciary acts provide that in any suit of a civil nature at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in which there is a controversy between the citizens of different states, the United States courts shall have jurisdiction.¹ It was at first held in the federal courts that a corporation was not a "citizen" within these provisions.² But this decision has been overruled, and it is now settled that a corporation is a citizen of the state which created it.³ A corporation chartered and created by two or more

¹ Act 1789, 1 Stat. 79, c. 20, sec. 12; Act 1866, 14 Stat. 306, c. 288; Act 1867, 14 Stat. 588, c. 196; Act 1875, 18 Stat. 220, c. 137.

² U. S. v. Devaux, 5 Cranch, 61.
³ R. R. Co. v. Whitton, 13 Wall. 270; *Marshall v. R. R. Co.*, 16 How. 329.

states is a citizen of each state.¹ Where existing corporations of different states are authorized by their respective states to consolidate and form one and the same company, such corporation is a citizen of each state.²

§ 350. **Foreign Corporations may be Sued.**—A foreign corporation may be sued, provided it is brought into court in a proper way.³ For a tort committed by a foreign corporation within a state, such corporation is liable to be sued therein if found in the state in the person of an officer or agent upon whom process may be served.⁴ The members of a corporation are legally presumed to be citizens of the state by the laws of which it was created, and in which alone the corporate body has a legal existence. And a suit by or against such corporation in its corporate name must be presumed to be a suit by or against citizens

¹ Ohio etc. R. R. Co. v. Wheeler, 1 Black, 286; Insurance Co. v. Francis, 11 Wall. 210; R. R. Co. v. Whitton, 13 Wall. 270. In Baltimore etc. R. R. Co. v. Harris, 12 Wall. 82, the court held that a legislative enactment of one state, "confirming" an act of incorporation of another state, and granting the same rights and privileges, and subjecting it to the same pains and penalties and obligations as imposed by the original act, and reserving the same rights, privileges, and immunities as is reserved in the original act, did not create a new corporation, but granted a license, and nothing more; its unity and ownership were unchanged, and therefore such corporation was amenable in the District of Columbia for an injury committed in Virginia.

² Insurance Co. v. French, 18 How. 404; Sprague v. R. R. Co., 5 R. I. 233; Maryland v. R. R. Co., 18 Md. 193.

³ Bushel v. Com. Ins. Co., 15 Serg. & R. 176; Lafayette Ins. Co. v. French, 18 How. 407; City Fire Ins. Co. v. Carrugi, 41 Ga. 670; North Mo. R. R. Co. v. Akers, 4 Kan. 453; 96 Am. Dec. 183; Folger v. Ins. Co., 99 Mass. 267;

96 Am. Dec. 747. In Libby v. Hodgson, 9 N. H. 394, Wilcox, J., said: "If, upon principles of law or comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities, and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here. There may be difficulties in procuring legal service of a writ upon a foreign corporation; and so, in case of an individual residing in a foreign jurisdiction, it may be difficult or impossible to procure such service of process upon him as to subject him to the jurisdiction of our courts. But in either case, when the service can be made, or when the person of the corporation appears and submits to our jurisdiction, we see no objection to the authority of the court to proceed."

⁴ Gray v. Taper-Sleeve Pulley Works, 15 Fed. Rep. 436.

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of the state creating the corporation.¹ An action against a foreign corporation having an agency in the state where the action is commenced is not prevented from proceeding to judgment by a subsequent decree dissolving the corporation and appointing receivers to wind up its affairs made in the state of its creation, unless it is shown that the corporation is utterly extinct.² A foreign corporation can only be sued in Massachusetts by means of attachment of its property, unless by virtue of an express statutory provision.³

ILLUSTRATIONS.—The provisions of a statute of Pennsylvania limited the amount of the debts and liabilities (not including capital stock) of certain companies to the amount of their capital actually paid in, and further provided that "if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases." In an action to recover for a violation of this statute, *held*, that the liability so created was in the nature of a penalty, and was not enforceable by action outside of the state which enacted the law: *First National Bank of Plymouth v. Price*, 33 Md. 487; 3 Am. Rep. 204.

§ 351. Service of Process on Foreign Corporations.—

At common law, service of process on the managing agent of the corporation in the state is the usual mode of obtaining jurisdiction.⁴ But it is generally provided by statute that service on certain agents of a foreign corporation shall be good,⁵ or that the corporation shall designate an attorney on whom service of process may be made.⁶ Service of process upon an officer of a foreign corporation, who is temporarily in another state, and who does not voluntarily appear to the action, does not give the courts

¹ *Hobbs v. Insurance Co.*, 56 Me. 417; 96 Am. Dec. 472.

² *Hunt v. Insurance Co.*, 55 Mo. 290; 92 Am. Dec. 592.

³ *Andrews v. Railroad Co.*, 99 Mass. 534; 97 Am. Dec. 51.

⁴ *Newby v. Manufacturing Co.*, L. R. 7 Q. B. 293; *Libby v. Hodgson*, 9 N. H. 394.

⁵ *Morawetz on Corporations*, sec. 524.

⁶ *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; 20 Am. Rep. 513.

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of that state jurisdiction over the corporation.¹ But it is not necessary under the Michigan statute that the officer or agent of a corporation upon whom service is made while in the state should be in the state upon official business for his corporation, or be specially authorized by it to receive service of process.² A voluntary appearance of a foreign corporation will confer upon a court having jurisdiction of the subject-matter full power to decide the matter in controversy, and the defendant corporation cannot afterwards set up as a defense want of jurisdiction of the person.³

¹ *Latimer v. R. R. Co.*, 43 Mo. 105; *Co.*, 61 Mich. 226; 1 Am. St. Rep. way, 43 Mo. 105; 97 Am. Dec. 571.

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² *Shickle Iron Co. v. Construction* 4 Kan. 388; 96 Am. Dec. 183.

³ *North Missouri R. R. Co. v. Akers*,

CHAPTER XXV.

THE POWERS OF CORPORATIONS AND THE VALIDITY OF CORPORATE ACTS.

- § 352. Powers of corporation are only those conferred by charter.
- § 353. Acts or contracts of corporations in violation of rules of law.
- § 354. Acts or contracts of corporations in violation of statutes.
- § 355. Acts or contracts of corporations in violation of charter.
- § 356. Statutory prohibition against exercising powers not granted by charter.
- § 357. Prohibitions in charter — If legislative intent be that prohibited act shall be void, courts will so hold.
- § 358. Prohibitions in charter — *Aliter* where prohibition is merely for benefit of share-holders.
- § 359. Prohibitions in charter — Formalities prescribed by charter.
- § 360. Acts of majority of corporators bind corporation.
- § 361. But only where act is authorized by charter.
- § 362. Contracts *ultra vires* — May be avoided if unexecuted.
- § 363. Defense of *ultra vires* — Not good against person without notice.
- § 364. Transfers of property — Valid though *ultra vires*.
- § 365. Executed contracts — Valid though *ultra vires*.
- § 366. Contracts unenforceable because *ultra vires* — Benefits received must be repaid.
- § 367. Corporations liable for torts.
- § 368. Corporation liable for torts committed in *ultra vires* transaction.
- § 369. *De facto* corporation — Validity of acts of.
- § 370. Fraud in obtaining charter — Misuser or non-user no defense in collateral proceeding.
- § 371. Corporation must be in existence *de jure* or *de facto*.
- § 372. Proof of existence of corporation.
- § 373. Powers of corporation are only those given by charter.
- § 374. Or those implied from nature of business.
- § 375. Grants of special privileges to corporations strictly construed.
- § 376. What are franchises.
- § 377. Franchises cannot be transferred nor mortgaged.
- § 378. Consolidation of corporations.
- § 379. Implied powers of corporations — To purchase and hold property.
- § 380. Implied powers of corporations — To transfer and sell property.
- § 381. Implied powers of corporations — To hold property in trust.
- § 382. Implied powers of corporations — To take by devise.
- § 383. Implied powers of corporations — To borrow money and make debts.
- § 384. Implied powers of corporations — To mortgage property.
- § 385. Implied powers of corporations — To issue negotiable paper.
- § 386. Implied powers of corporations — To sue and be sued.

- § 387. Implied powers of corporations — Other acts.
- § 388. Implied powers of corporations — Power of expulsion of members.
- § 389. Implied powers of corporations — Remedies for wrongful expulsion — Restoration.
- § 390. Corporation may do business in foreign state.
- § 391. May employ its surplus or property to best advantage.
- § 392. May alter its business to suit changes of time and circumstances.
- § 393. Power to issue preferred stock.
- § 394. Power to issue preferred stock — Rights of preferred stockholders.
- § 395. Power to alter charter.
- § 396. Power to alter charter — What not "alterations" — Grant of additional franchises — Discharge of obligations to state.
- § 397. Effect of alteration on stockholder's liability.
- § 398. Cannot engage in different business from that which it was chartered to engage in — Illustrations.
- § 399. Authority to wind up business.
- § 400. No implied power to enter into partnership.
- § 401. No implied power to deal in shares of other corporations.
- § 402. No implied power to alter amount of capital stock, or purchase its own shares.
- § 403. No implied power to give away property gratuitously.
- § 404. The corporation name.
- § 405. The corporation seal.

§ 352. Powers of Corporation are only Those Conferred by Charter.—A corporation has only such rights and powers as are expressly conferred by its charter, or as are necessary to carry its rights and powers into effect.¹ The term *ultra vires*, when used in reference to corporations, is employed in different senses. An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances; and an act is also said to be *ultra vires* with reference to the rights of certain parties, when the corporation cannot perform it without their consent; and it may also be *ultra vires* with reference

¹ Head v. Providence Ins. Co., 27 Pa. St. 339; 67 Am. Dec. 471; Dartmouth College v. Woodward, 4 Wheat. 636; Beatty v. Marine Ins. Co., 2 Johns. 109; 3 Am. Dec. 401; People v. Utica Ins. Co., 15 Johns. 358; 8 Am. Dec. 243; State v. Mayor of Mobile, 5 Port. 279; 30 L. Dec. 564; Matthews v. Skinker, 62 Mo. 329; 21 Am. Rep. 425; Weckler v. Bank, 42 Md. 581; Commonwealth v. R. R. Co., 124

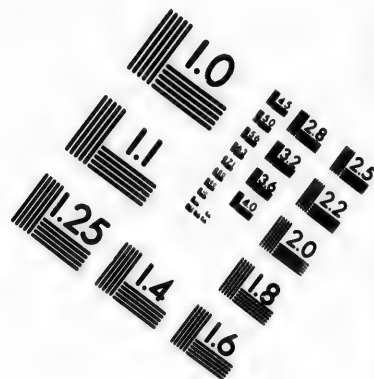
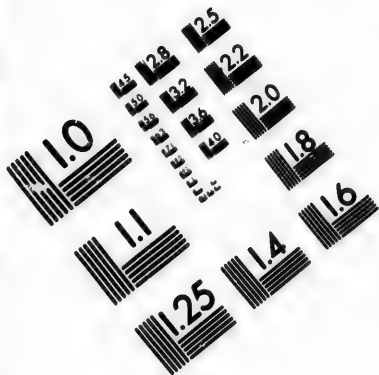
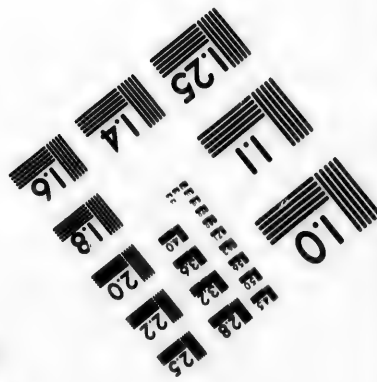
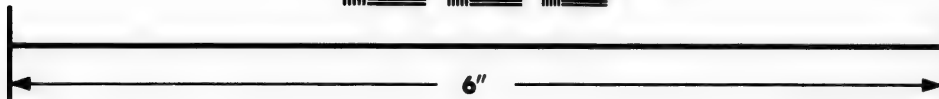
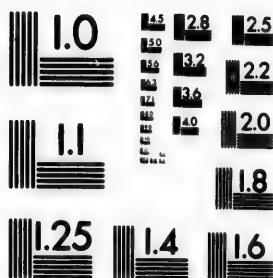


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to some specific purpose, when the corporation cannot perform it for that purpose.¹ When the act of the corporation is *ultra vires* in the first sense, it is void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second or third sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.² Corporations are presumed to contract within their powers; and general words used in a corporate contract, which admit a double construction, will be construed consistently with the charter.³ A corporation which sets up a lack of power to do a particular act within the scope of its general powers assumes the burden of proving such defense.⁴ The burden of showing that any contract of a corporation exceeds its corporate powers rests on the party objecting.⁵ A corporation acting within the scope of its authority has all the powers of ordinary persons.⁶

§ 353. Acts or Contracts of Corporations in Violation of Rules of Law.—Any contract made or act done by a corporation, contrary to a rule of law, is as invalid as such a contract or act would be in the case of an individual.⁷

§ 354. Acts or Contracts of Corporations in Violation of Statutes.—The same principle applies to contracts or acts prohibited by statute.⁸ Thus it has been held that a statute providing that in addition to the powers enumerated in the first section of the act (which are the ordinary powers of all corporations), "and to those expressly

¹ *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.

² *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.

³ *Morris etc. R. R. Co. v. R. R. Co.*, 20 N. J. Eq. 542.

⁴ *Kappel v. Chaari Zedek Congregation*, 19 Hun, 364.

⁵ *Downing v. Mount Washington etc. Co.*, 40 N. H. 230.

⁶ *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416; 1 Am. St. Rep. 150.

⁷ *Thomas v. R. R. Co.*, 101 U. S. 71; *Hartford M. R. Co. v. R. R. Co.*, 3 Robt. 416; *Messenger v. R. R. Co.*, 36 N. J. L. 413; 13 Am. Rep. 457.

⁸ *Pangborn v. Westlake*, 36 Iowa, 546; *Harris v. Runnels*, 12 How. 79.

given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given," — is a prohibition of any acts not within the scope of the powers permitted.¹

§ 355. Acts or Contracts of Corporations in Violation of Charter.—The same principle also applies where the act or contract is in violation of any provision in the charter or act of incorporation.² Where a bank charter provides that no director shall be indebted to it beyond a certain amount, a note given to it by a director beyond that amount is void.³ Parties dealing with corporations are chargeable with notice of the limitations imposed by the charter upon their powers.⁴

§ 356. Statutory Prohibition against Exercising Powers not Granted by Charter.—Where a statute prohibits a corporation from exercising any powers or doing any act except those granted to it by its charter, it is held in some states that contracts made or acts done in violation of such statute are void.⁵ In other states, such a provision is not considered as rendering such unauthorized contracts or acts wholly void.⁶

¹ Morris etc. R. R. Co. v. R. R. Co., 20 N. J. Eq. 542.

² Taylor v. R. R. Co., L. R. 2 Ex. 379; In re Cork R. R. Co., L. R. 4 Ch. App. 748; In re Hitchcock, 7 Ala., N. S., 386; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Whitney v. Peay, 24 Ark. 22; Rutland R. R. Co. v. Proctor, 29 Vt. 93; Ohio Life Ins. Co. v. Merchants' Ins. Co., 11 Humph. 24; 53 Am. Dec. 742; State Board v. R. R. Co., 47 Ind. 411; Wood Mac. Co. v. Caldwell, 54 Ind. 271; Bank v. Owens, 2 Pot. 527; Martin v. Zellerbach, 38 Cal. 300; 99 Am. Dec. 365; Crocker v. Whitney, 71 N. Y. 161; People v. Utica

Ins. Co., 15 Johns. 383; 8 Am. Dec. 243; Bank v. Swayne, 8 Ohio, 257; 32 Am. Dec. 707; Sherwood v. Alvis, 83 Ala. 115; 3 Am. St. Rep. 695.

³ Workingmen's Banking Co. v. Rautenberg, 103 Ill. 460; 42 Am. Rep. 26.

⁴ Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43; 28 Am. Rep. 9.

⁵ Ashbury R. R. Co. v. Riche, L. R. 7 H. L. 653; Morris etc. R. R. Co. v. R. R. Co., 20 N. J. Eq. 542.

⁶ Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504; Moss v. Averell, 10 N. Y. 460.

§ 357. Prohibitions in Charter—If Intent of Legislature was that Prohibited Act should be Void, Courts will so Held.—Where it appears clear from the words of the charter that the legislature intended that a forbidden act or contract should be absolutely void, it will be so held by the courts.¹

ILLUSTRATIONS.—The charter of a bank prohibits it from charging interest in excess of a certain rate. A contract violating this provision is void: *Bank v. Owens*, 2 Pet. 527; *Bank v. Swayne*, 8 Ohio, 257. A statute prohibits any banking corporation from issuing or circulating any bill or note not payable on demand and without interest. A bill or note issued contrary to this enactment is void: *Tracy v. Tallmage*, 14 N. Y. 162; 67 Am. Dec. 132. A statute makes it unlawful for the agents of foreign insurance companies to transact business before procuring a certificate of authority from the state. A promissory note given to an insurance company which had not obtained the certificate is void: *Cincinnati etc. Ass'n Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626.

§ 358. Aliter where Prohibition is Merely for Benefit of Share-holders.—On the other hand, where the prohibition in a charter appears to have been inserted for the benefit of the share-holders only, a contract or act in violation of the prohibition, though *ultra vires*, is not absolutely void, but may be executed and ratified by the corporation.² A statute prohibiting savings banks from loaning money on the security of names alone is directory to the trustees, and designed for the protection of the depositors, and will not prevent a bank from enforcing payment of a promissory note, whether the purchase was or was not in conformity with its provisions.³ Where property which a corporation, under certain circumstances, is authorized by its charter to acquire is purchased in a mode or for a purpose not authorized, the title of the corpora-

¹ In re Comstock, 3 Saw. 218; *Bank v. Page*, 6 Or. 431; 98 U. S. 621; *Thornton v. Bank*, 71 Mo. 221; *Mott v. U. S. Trust Co.*, 19 Barb. 568.

² *Hazlehurst v. R. R. Co.*, 43 Ga. 13; *Ayres v. Banking Co.*, L. R. 3 P. C. 548; *National Bank v. Matthews*, 71 Me. 49.

³ *Farmington Savings Bank v. Fall*, 71 Me. 49.

tion to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer.¹ A corporation which has been duly organized in pursuance of the laws of a state has the power to transact such business as its charter contemplates, although the entire amount of the capital stock as fixed by the charter has not yet been subscribed for or taken.²

§ 359. Same—Formalities Prescribed by Charter.—

Of provisions of the kind referred to in the last section are those in corporation charters or acts of incorporation prescribing certain formalities to be observed in corporate acts. Acts done not in conformance with these provisions are not absolutely void.³

ILLUSTRATIONS.—The charter requires the contracts of the corporation to be executed in a certain form. *Held*, that it is liable upon its contracts made in a different form: *Bulkley v. Fishing Co.*, 2 Conn. 252; 7 Am. Dec. 271; *Kilgore v. Bulkley*, 14 Conn. 362. A by-law provided that contracts signed by the president and secretary should be binding. *Held*, that this did not exclude other modes of contracting: *De Graff v. American etc. Linen Co.*, 21 N. Y. 124.

§ 360. Acts of Majority of Corporators Bind Corporation.—A majority of the members of a corporation may bind it, and the will of the majority is presumed to be the act of the whole, and binds the dissenting minority.⁴

§ 361. But only where Act is Authorized by Charter.—But the majority can only bind the entire body within the limits of its powers, and therefore a corporation is not bound by a majority of its members, unless the act was authorized by the charter.⁵ The principle of this

¹ *Ehrman v. Union Central Life Ins. Co.*, 35 Ohio St. 324.

² *Massey v. Citizens' Building etc. Ass'n*, 22 Kan. 624.

³ *Zabriskie v. R. R. Co.*, 23 How. 381; *Bank v. Dandridge*, 12 Wheat. 64; *Bank v. Weed*, 17 Barb.

383. But see *Kinzie v. Trustees*, 3 Ill. 187; 33 Am. Dec. 443.

⁴ *New Orleans etc. R. R. Co. v. Harris*, 27 Miss. 537.

⁵ *Burgess's Case*, 31 L. J. Ch. 749; *Nalush v. Irving, Gow on Partnership; Ormsby v. Vermont etc. Co.*

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rule is, that when several persons enter into a contract, the terms of the contract cannot be altered, except with the consent of all. On this ground it has been held that a majority of the stockholders cannot accept an alteration of their charter,—even from the legislature,—but that the consent of every member is essential.¹ Nor can the majority effect a consolidation with another corporation.²

56 N. Y. 623; *Kean v. Johnson*, 9 N. J. Eq. 407, where it is said: "As stockholders, they own the road in common, to be employed in specified uses. Each owns a share in the whole, and is to have a proportionate share in its profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road and in every dollar it earns. The directors are their trustees to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine *within the scope* of this mutual contract, they each agree to abide by; but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not consistent with, and growing out of, this original fundamental joint intention. To sell the road, to abandon the contemplated investment and embark in another scheme, whether entirely different, or only more extensive than the original contemplation as apparent on the face of the charter, is, it seems to me, clearly contrary to the rights of the individual stockholders. If they had any right as partners or beneficiaries, it would seem to be this, that their money should be devoted to that use, and never employed in any other, nor returned to them before they desire it."

¹ *New Orleans etc. R. R. Co. v. Harris*, 27 Miss. 517.

² *Mowery v. R. R. Co.*, 4 Biss. 78; *Clearwater v. Meredith*, 1 Wall. 25; *Pearce v. R. R. Co.*, 21 How. 441;

Stevens v. R. R. Co., 29 Vt. 565; *New Orleans etc. R. R. Co. v. Harris*, 27 Miss. 549; *Tuttle v. R. R. Co.*, 35 Mich. 247. In *Lauman v. R. R. Co.*, 30 Pa. St. 46, 72 Am. Dec. 685, the court said: "He [the dissenting stockholder] may object that it is a violation of the contract of association by which he and his associates agree to become one corporate company for a given purpose; that he united in the association for one purpose, then agreed on, and now the majority are diverting their capital to a different purpose. This is a violation of chartered contract,—not the supposed one between the government and the corporators, but the one between the corporators themselves. He may object that his co-corporators have no power to make a new contract for him, and thereby constitute him a member of a new and different corporation; for it is of the very nature of a contract relation that it can be instituted only by the real parties to it, unless it be a mere constructive contract, which is only a convenient form or fiction of law, invented to enforce a corresponding legal duty. He may object that even the legislature cannot authorize this, for by doing so, they would authorize the destruction of one private contract, and the compulsory creation of another in its stead, and would take away the remedy by due course of law, which the dissenting stockholder is entitled to, because of the departure or diversion of the association from its agreed purposes; and would, besides this, change the essential nature of contracts, which even legislative power cannot do, and much less legislative authority. He may object that, though in corporate action, after the corporation is consti-

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§ 362. **Contract Ultra Vires may be Avoided if Unexecuted.**—A contract *ultra vires*—that is to say, outside of and not authorized by its charter—may be avoided by either party so long as it remains unexecuted.¹ Courts will not compel a corporation to perform a contract *ultra vires*.² Nor will they enforce specific performance of a contract *ultra vires* at the suit of the corporation.³

§ 363. **Defense of Ultra Vires—Not Good against Person without Notice.**—That the corporation had no authority to make a contract cannot be set up by the corporation as a defense against a person who had no notice of such want of authority.⁴

ILLUSTRATIONS.—A company, supposing itself to be incorporated, issued paper in its corporate name, but afterwards finding that it was not properly organized, it dissolved, and was legally incorporated under a different name. *Held*, that it could not repudiate its paper: *Empire Mfg. Co. v. Stuart*, 46 Mich. 482. A corporation was authorized to issue bonds secured by mortgage to the amount of two thirds of its capital paid in, and it issued bonds to an amount less than two thirds

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tuted, and its province defined, the details of its business and the making of its contracts must necessarily be under the control of a majority; yet it is of the nature of things that, in the act of constituting the corporation, and of taking stock, each man must act for himself, and therefore that he cannot, by a vote of a corporate majority of the Lebanon Company, and against his consent, be constituted a member of the Reading Company."

¹ *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, the court saying: "This doctrine [of estoppel] is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits, for the purpose of enforcing a contract. Not

only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages."

² *Hitchcock v. Galveston*, 96 U. S. 341; *Bank v. Niles*, Walk. Ch. 99; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30.

³ *Bank v. Niles*, 1 Doug. (Mich.) 401; 41 Am. Dec. 575; *Nassau Bank v. Jones*, 95 N. Y. 115.

⁴ *Safford v. Wyckoff*, 4 Hill, 442; *Stoney v. Am. Life Ins. Co.*, 11 Paige, 635; *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656; *Manufacturing Co. v. Canney*, 54 N. H. 296; *Page v. R. R. Co.*, 31 Fed. Rep. 257.

of its authorized capital, but much more than the amount paid in. *Held*, that the bonds were enforceable in the hands of *bona fide* holders: *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548.

§ 364. Transfers of Property Valid though Ultra Vires.—Transfers of property—real or personal—by or to a corporation will be recognized as valid, even though the transfer may have been beyond the power or *ultra vires* the corporation.¹

§ 365. Executed Contracts Valid though Ultra Vires.—And where the contract has been performed or partially performed by either of the parties, the other cannot set up as a defense to an action that the corporation had no authority to enter into it.² A corporation which has

¹ *Shewalter v. Pirner*, 55 Mo. 218; *Runyan v. Coster*, 14 Pet. 122; *Cowell v. Springs Co.*, 100 U. S. 55; *National Bank v. Matthews*, 98 U. S. 621; *Barrow v. Nashville etc. Co.*, 9 Humph. 304; *Chicago etc. R. R. Co. v. Lewis*, 53 Iowa, 101; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Groundie v. Northampton Water Co.*, 7 Pa. St. 233; *Grant v. Henry Clay Co.*, 80 Pa. St. 218; *Kelly v. Transportation Co.*, 3 Or. 189; *R. R. Co. v. Howard*, 7 Wall. 393; *Natoma Water Co. v. Clarkin*, 14 Cal. 552; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 544; 99 Am. Dec. 300; *Edwards v. Fairbanks*, 27 La. Ann. 449; *Parish v. Wheeler*, 22 N. Y. 494; *National Bank v. Porter*, 125 Mass. 332, 28 Am. Rep. 235; *Hough v. Cook Co. Land Co.*, 73 Ill. 23; 24 Am. Rep. 230.

² *Morawetz on Corporations*, sec. 100; *Hitchcock v. Galveston*, 96 U. S. 341; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Arnot v. R. R. Co.*, 67 N. Y. 319; *State Board v. R. R. Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Merchants' Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 605; *Germantown Mutual Ins. Co. v. Dhein*, 43 Wis. 420; 28 Am. Rep. 549; *Wright v. Pipe Line Co.*, 101 Pa. St. 204; 47 Am. Rep. 701; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *American Union Tel. Co. v.*

R. R. Co., 1 McCrary, 188. In *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504, a company chartered to manufacture firearms entered into a contract to make railroad locks. Having made and delivered a large number of them, it was held that it could recover the contract price. Said the court: "It must be conceded that the manufacturing and vending of 'railroad locks' is not within the purposes for which the plaintiff was incorporated, or within the powers conferred by its charter. Neither is such business incidental to the purposes of the incorporation, or in any way necessary to, or, as far as appears, even an aid in, the exercise of the powers conferred upon the plaintiff by its constitution, so that it could be regarded as among the implied powers granted by the legislature, and assumed by the corporators. Did the question now made arise upon an application by the stockholders and corporators, to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation, or engaging in business outside of that for which the company was formed, or on proceedings by the sovereign power to annul the charter for an abuse of the powers granted, or in a proceeding to enforce and for the performance of an executory con-

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tract, where, upon a rescission or annulling the agreement, both parties would have the same position as if no contract had been made, the rules of decision would be different from those which must prevail in the present action. In either of the cases suggested, it is very likely the courts would be compelled to give full effect to the objection, and hold the business unauthorized, and a violation of the charter, and a forfeiture of the chartered rights, and the contract null, and refuse to perform it or give effect to it. The manufacture of the locks, or contract to sell them to the Seal Lock Company, were not acts immoral in themselves, or forbidden by any statute, neither *mala in sese* or *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action,—such a contract as the law will not recognize or enforce; but applying the maxim, *Ex facto illicito non oritur actio*, leave the parties as it finds them. When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the share-holders, that the affairs shall be managed, and the funds applied solely, for carrying out the objects for which the corporation was created: *Earl of Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. 593; *Taylor v. Chichester and Midhurst R. Co.*, L. R. 2 Ex. 356; *Bissell v. Michigan C. R. Co.*, 22 N. Y. 258. Whether the contract as originally made was *ultra vires* is not a very important inquiry at this time. If it was, the state under whose sovereignty it dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed, and a work fully accomplished, whatever may be its right to annul its charter. The share-holders whose confidence has been abused, and whose funds have been diverted from

their proper use, have a direct interest in reclaiming and restoring to proper custody, and applying to legitimate uses, the funds which have been diverted and improperly used for purposes *dehors* the legitimate business of the corporation. The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong. Here, as between two corporations, the debtor and creditor corporation, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Company has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation. It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully per-

against a decree for specific performance.¹ A railroad corporation which, *ultra vires*, has taken a lease, and occupied under it, cannot, when sued for the rent, set up its want of power to take the lease.² A fire insurance company having insured against hail, which it was not authorized to do, the insured having performed his part of the contract, and the company, having accepted the benefit, is estopped to set up its want of power to issue such a policy.³ One who has given a mortgage to a corporation from which he has received a loan is estopped to deny, in a suit to foreclose, that it had authority to make the loan.⁴ Where the payment of bonds issued by one company is guaranteed by another company, and the guaranty is partly performed, the former company cannot avoid a mortgage executed to indemnify the latter on the ground that the guaranty was *ultra vires*, at least so far as the actual payments were concerned.⁵ A corporation which without legal authority has discounted commercial paper may recover the money loaned, although the securities are void.⁶ A recovery may be had for work and labor in engraving bills for a corporation, although the corporation is prohibited by law from engaging in the business of banking.⁷ It cannot resist an action to recover money loaned to it, upon the ground that the money was borrowed and expended in a business beyond the corporate powers.⁸ It is bound by its note in the hands of an innocent holder for value, although in executing it the corpo-

formed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. *Ex parte Chippendale*, 4 De Gex, M. & G. 19; *In re National P. B. Build. Soc.*, L. R. 5 Ch. App. 309; *In re Cork etc. R. Co.*, L. R. 4 Ch. App. 748; *Fishmongers' Co. v. Robertson*, 5 McG. 131."

¹ *People's Gas Light and Coke Co. v. Gas Light etc. Co.*, 20 Ill. App. 473.

² *Camden etc. R. R. Co. v. R. R. Co.*, 43 N. J. L. 530.

³ *Denver Ins. Co. v. McClellan*, 9 Col. 11; 59 Am. Rep. 135.

⁴ *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172.

⁵ *Macon etc. R. R. Co. v. R. R. Co.*, 63 Ga. 103.

⁶ *Pratt v. Short*, 79 N. Y. 437; 35 Am. Rep. 531.

⁷ *Underwood v. Newport Lyceum*, 5 B. Mon. 129; 41 Am. Dec. 260.

⁸ *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656; *Conn. River Savings Bank v. Fiske*, 60 N. H. 363.

ration exceeded the amount of indebtedness which it was authorized to incur.¹

§ 366. Contracts not Enforceable because Ultra Vires—Benefits Received Recoverable.—Where the contract cannot be enforced because it is *ultra vires*, the benefits which either party has received under the contract the courts will require to be repaid to the other.² A corporation cannot retain property acquired under a transaction *ultra vires*, and at the same time repudiate its obligations under the same transaction.³ It cannot retain money borrowed, and plead *ultra vires* to a suit for its recovery.⁴ An officer of a corporation, sued by the corporation for unlawfully converting stock purchased by him for the corporation, cannot plead *ultra vires* in defense.⁵

ILLUSTRATIONS.—A company incorporated to do business as a common carrier made a contract with defendant to buy a quantity of grain. *Held*, that the contract was *ultra vires*, and that therefore plaintiff could maintain no action for non-delivery of the grain, but that it could recover back the part of the purchase-money already paid: *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781.

§ 367. Corporations Liable for Torts.—Though at one time the courts held that a corporation could not commit a tort,⁶ this doctrine is obsolete, and it is now the settled law that a corporation is liable for the torts of its agents to the same extent as an individual,⁷ and the doctrine of

¹ *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291; 41 Am. Rep. 285.

² *Brice's Ultra Vires*, 2d ed., 769; *Hardy v. Land Co.*, L. R. 7 Ch. 427; *In re Phoenix Life Ass. Co.*, 2 Johns. & H. 441; *Humphrey v. Patrons' Ass'n*, 50 Iowa, 607; *In re German Mining Co.*, 4 De Gex, M. & G. 19; *In re Electric Tel. Co.*, 29 Beav. 353; *In re Cork etc. R. R. Co.*, L. R. 4 Ch. 760; *New Castle R. R. Co. v. Simpson*, 23 Fed. Rep. 214.

³ *Memphis etc. R. R. Co. v. Dow*, 19 Fed. Rep. 388.

⁴ *Millard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341.

⁵ *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 217.

⁶ See *Orr v. Bank*, 1 Ohio, 36; 13 Am. Dec. 588.

⁷ *Main v. R. R. Co.*, 12 Rich. 82; 75 Am. Dec. 725; *Whiteman v. R. R. Co.*, 2 Harr. (Del.) 514; 33 Am. Dec. 411; *Underwood v. Newport Lyceum*, 5 B. Mon. 129; 41 Am. Dec. 260; *Meares v. Commissioners of Wilmington*, 9 Ired. 73; 49 Am. Dec. 412; *Walling v. Mayor*, 5 La. Ann. 660; 52 Am. Dec. 608; *Raymond v. City of Lowell*, 6 Cush. 524; 53 Am. Dec. 57; *Atlantic etc. R. R. Co. v. Dunn*, 1 Ohio St. 162; 2 Am. Rep. 382; *Alexander v. Relie*,

ultra vires has no application in favor of corporations for wrongs committed by them.¹ Therefore a corporation is liable for the deceit or false representations of its agents;² for assault and battery;³ for the damages caused by the wrongful canceling of a certificate of its stock by its president and secretary;⁴ for libel or slander;⁵ for the tort of its agent in refusing to deliver chattels to their owner;⁶

74 Mo. 495; *Moore v. R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83; *Jones v. R. R. Co.*, 27 Vt. 399; 65 Am. Dec. 207; *First Nat. Bank v. Graham*, 100 U. S. 699, Mr. Justice Swayne saying: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances: *Merchants' Bank v. State Bank*, 10 Wall. 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance, touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence: *R. R. Co. v. Quigley*, 21 How. 209; 2 Wait on Actions and Defenses, pp. 337-339; *Angell and Ames on Corporations*, secs. 186, 385; *Cooley on Torts*, pp. 119, 120."

¹ *National Bank v. Graham*, 100 U. S. 699.

² *Peebles v. Patapsco Co.*, 77 N. C. 233; 24 Am. Rep. 447; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Fogg v. Griffin*, 2 Allen, 1; *Butler v. Watkins*, 13 Wall. 456. But not unless it has authorized them, or there is proof of bad faith, or absence of reasonable grounds of belief: *Houston etc. R. R. Co. v. McKinney*, 55 Tex. 176; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508.

³ *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; *Hewitt v. Swift*, 3 Allen, 420; *Ramaden v. R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200; *Chicago etc. R. R. Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641; *St. Louis etc. R. R. Co. v. Dalby*, 10 Ill. 353; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520.

⁴ *Factors' etc. Ins. Co. v. Marine Dry Dock etc. Co.*, 31 La. Ann. 149.

⁵ *Howe Co. v. Souder*, 58 Ga. 64; *Aldrich v. Press Co.*, 9 Minn. 133; 86 Am. Dec. 84; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; 23 Am. Rep. 680; *Vinas v. Merchants' Ins. Co.*, 27 La. Ann. 367; *Johnson v. St. Louis etc. Co.*, 2 Mo. App. 565; 65 Mo. 539; 27 Am. Rep. 293; *Daily Post Co. v. McArthur*, 16 Mich. 447; *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202; *Tench v. R. R. Co.*, 33 U. C. Q. B. 8; *Maynard v. Fireman's Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; *McDermott v. Evening Journal*, 43 N. J. L. 488. *Aliter* where it is not in the course of the duty of the agent who published it, and is not authorized or ratified by the corporation: *Southern Express Co. v. Fitzner*, 59 Miss. 581; 42 Am. Rep. 379. One corporation may maintain an action against another which slanders its business and represents its product to be of inferior quality: *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153. An allegation that the president of a corporation interfered with plaintiff's trade and calling as a merchant, by telling others that he had no right to sell his goods, etc., does not state a cause of action against the corporation: *Perkins v. Maysville District Camp-Meeting Association*, Ky., 1888.

⁶ *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31.

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§ 368. Corporation Liable for Torts Committed in Ultra Vires Transaction. — A corporation is liable for a tort committed by it while acting in or carrying on an undertaking or business or doing any act beyond its chartered powers.³

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p. 200; Chi-
Williams, 55
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19 Ill. 353;
v. Vandiver,
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§ 369. De Facto Corporation — Validity of Acts of. — The validity of corporate acts performed by an association which is not legally incorporated is governed by the same rules as the validity of corporate acts, performed by a lawfully incorporated company beyond its charter powers.⁴ A *de facto* corporation is estopped to deny its existence as to those who deal with it, but this does not preclude proof of the subsequent cessation of its corporate functions.⁵ As in the case of an incorporated company, contracts entered into by a corporation *de facto* are binding if exe-

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¹ Goodspeed v. East Haddam Bank, 22 Conn. 530; 58 Am. Dec. 439; Coffy v. Grover, 2 Woods, 494; Carter v. Howe, 51 Md. 290; 34 Am. Rep. 311; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505; Williams v. Planters' Ins. Co., 57 Miss. 759; 34 Am. Rep. 494; Wheless v. Nat. Bank, 57 Tenn. 469; 25 Am. Rep. 783; Vance v. R. R. Co., 32 N. J. L. 334; 90 Am. Dec. 665; Fenton v. Wilson Sewing Machine Co., 9 Phila. 189; Reed v. Home Savings Bank, 130 Mass. 443; 39 Am. Rep. 469; Jordan v. R. R. Co., 74 Ala. 85; 49 Am. Rep. 800; Ricord v. R. R. Co., 15 Nev. 167; American Ex. Co. v. Patterson, 73 Ind. 430; Wheeler and Wilson Mfg. Co. v. Boyce, 36 Kan. 350; 59 Am. Rep. 571; Hussey v. R. R. Co., 98 N. C. 34; 2 Am. St. Rep. 312. See Gillett v. R. R. Co., 55 Mo. 315; 17 Am. Rep. 653, overruled in Boogher v. Life Ass'n, 75 Mo. 319; 42 Am. Rep. 413. A corporation which ratifies or accepts the unauthorized malicious acts of its agents is liable in exemplary damages: Galves-

ton etc. R. R. Co. v. Donahoe, 50 Tex. 162. In Maryland, where a criminal prosecution for embezzlement was set in motion by an employee or the corporation, it was held that, to render the corporation liable, express authority or ratification and adoption by the corporation must be shown: Carter v. Howe Machine Co., 51 Md. 290; 34 Am. Rep. 311.

² Riddle v. Proprietors, 7 Mass. 169; 5 Am. Dec. 35; Chestnut Hill Co. v. Rutter, 4 Serg. & R. 6; 8 Am. Dec. 675; Main v. R. R. Co., 12 Rich. 82; 75 Am. Dec. 725; Brokaw v. R. R. Co., 32 N. J. L. 328; 90 Am. Dec. 659.

³ New York etc. R. R. Co. v. Haring, 47 N. J. L. 137; 54 Am. Rep. 123; Bulfett v. R. R. Co., 40 N. Y. 168; Hutchinson v. R. R. Co., 53 Tenn. 634; Birdsell v. R. R. Co., 22 N. Y. 258; Central R. R. Co. v. Smith, 76 Ala. 572; 25 Am. Rep. 353; Tinsman v. R. R. Co., 26 N. J. L. 148; 69 Am. Dec. 565.

⁴ Morawetz on Corporations, sec. 136.

⁵ Dobson v. Simonton, 86 N. C. 492.

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cuted.¹ And the same rule applies to transfers of property made by or to a corporation *de facto*.²

ILLUSTRATIONS. — Certain persons drew up and signed articles of incorporation of a cattle company, and before they were filed for record, and before the time fixed for the commencement of the business of the corporation, they selected a president, who, in their presence and with their approval, executed and delivered to M. a note, in consideration of certain property for the corporation, which after the organization was perfected, and after the time fixed for the commencement of its business came into its possession and ownership, and was used and enjoyed by it. *Held*, that M.'s indorsee could recover on the note against the corporation: *Paxton Cattle Co. v. Bank*, 21 Neb. 621; 59 Am. Rep. 852.

§ 370. Charter Obtained by Fraud — Misuser or Non-user — No Defense in Collateral Proceeding. — "It cannot be shown in defense to a suit by a corporation that the charter was obtained by fraud. Neither can it be shown that the charter has been forfeited for misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the state, instituted directly against the corporation for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits until it be judicially declared."³ Nor can the validity

¹ *Palmer v. Lawrence*, 3 Sand. 161; *Platte Valley Bank v. Harding*, 1 Neb. 461; *Douglas Co. v. Bolles*, 94 U. S. 104; *Aller v. Cameron*, 3 Dill. 198; *Dooley v. Chester Glass Co.*, 15 Gray, 494; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128.

² *Smith v. Sheeley*, 12 Wall. 385; *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415; *Case v. Benedict*, 9 Cush. 540; *West Winsted Bank v. Ford*, 27 Conn. 282; 71 Am. Dec. 66; *Palmer v. Lawrence*, 3 Sand. 161; *Thompson v. Candor*, 60 Ill. 244; *Dooley v. Wolcott*, 4 Allen, 406.

³ *Kayser v. Bremen*, 16 Mo. 90; *County of Macon v. Shores*, 97 U. S. 277; *Pattison v. Building Ass'n*, 63 Ga. 373; *Minor v. Mechanics' Bank*, 1 Pet. 60; *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 129; *Trustees*

v. Hills, 6 Cow. 23; 16 Am. Dec. 429; *Penobscot Boom Co. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Mickles v. Rochester Bank*, 11 Paige, 118; 42 Am. Dec. 103; *Cahill v. Ins. Co.*, 2 Doug. (Mich.) 124; 43 Am. Dec. 457; *Jones v. Bank*, 8 B. Mon. 122; 46 Am. Dec. 540; *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Southern Ins. Co. v. Lanier*, 5 Fla. 119; 58 Am. Dec. 448; *Butchers' etc. Bank v. McDonald*, 130 Mass. 264; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Turnpike Co. v. McCarty*, 3 Ind. 392; 65 Am. Dec. 768; *Taggart v. R. R. Co.*, 24 Md. 563; 89 Am. Dec. 760. The state may complain if a corporation violates its charter, but a third party cannot, unless he is specially damaged: *Belcher Sugar Refining Co. v. St. Louis Grain Elevator*

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of the incorporation be impeached by proving, *aliunde* the certificate of incorporation, that certain prerequisites of the law have not been complied with;¹ nor by irregularities in adopting its by-laws or electing its officers.² The validity of the articles of incorporation of an association cannot be inquired into collaterally;³ and thus the ownership of a wagon-road claimed by a corporation cannot be inquired into in a proceeding by a third party to compel the county authorities to fix rates of toll.⁴ No party except the state can object that a corporation is holding real estate in excess of its rights.⁵ Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation.⁶

ILLUSTRATIONS. — A corporation, authorized to receive grants of land for its purposes, brings suit against a trespasser to recover possession of lands granted to it. *Held*, that the trespasser will not be heard to question its title on the ground that it had no authority to take them: *Southern Pacific R. R. Co. v. Orton*, 6 Saw. 157. There was a law authorizing the formation of railroad companies, under which articles of association were prepared and filed with the secretary of state, who issued the certificate provided for. There was a user of the franchise purporting to be invested with the association, and the road was built and used under this authority. *Held*, that the association became a *de facto* corporation, and neither the eligibility of the directors, nor the rightfulness of the existence of the corporation, could be questioned collaterally in a suit by the company: *Cincinnati etc. R. R. Co. v. R. R. Co.*, 75 Ill. 113.

§ 371. Corporation must be in Existence, either de Jure or de Facto. — But a corporation must be in existence

Co., 10 Mo. App. 401. Judgment obtained against corporation as such estops party from afterwards denying its corporate existence: *Pochelu v. Kemper*, 14 La. Ann. 308; 74 Am. Dec. 433.

¹ *Lafin and Rand Powder Co. v. Sinsheimer*, 46 Md. 315; 24 Am. Rep. 522.

² *Ginrich v. Patrons' Mill Co.*, 21 Kan. 61.

³ *Keene v. Van Reuth*, 48 Md. 184; *Swartwout v. R. R. Co.*, 24 Mich. 389.

⁴ *Weaverville etc. Wagon Road Co. v. Trinity County Supervisors*, 64 Cal. 69.

⁵ *Alexander v. Tolleston Club*, 110 Ill. 65.

⁶ *Indianapolis etc. Mining Co. v. Herkimer*, 46 Ind. 142.

either *de jure* or *de facto*. In an action upon a contract brought by a corporation, the defendant may always deny the existence of the corporation.¹ A contract with a corporation does not estop the party making it to dispute its existence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void.²

§ 372. Proof of Existence of Corporation.—In order to establish the existence of a corporation, it is, as a rule, necessary to show the adoption of a charter or articles of association, and that the corporation has held itself out to the world as such.³ The mere acting as a corporation for any length of time is not sufficient. If the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, some of those regulations and forms must have been observed, although others have been omitted.⁴ The fact that a person has entered into a contract with a corporation, as such, is *prima facie* evidence that it is a corporation *de facto* at least.⁵ A corporation in suing need not aver how it was incorporated.⁶ That the corporation is mis-named in a contract is not material, if its identity can be established.⁷

§ 373. Powers of Corporation are only Those Given by Charter.—The powers of a corporation are those and those only which expressly or impliedly are given to it by its charter or act of incorporation. Whatever acts are not so authorized are prohibited. "The charter of a corpora-

¹ Morawetz on Corporations, sec. 138.

² Snyder v. Studebaker, 19 Ind. 462; 81 Am. Dec. 415.

³ Morawetz on Corporations, sec. 139.

⁴ De Witt v. Hastings, 40 N. Y. Super. Ct. 463; Abbott v. Omaha

Smelting Co., 4 Neb. 416.

⁵ Williams v. Cheney, 3 Gray, 215;

Jones v. Type Foundry, 14 Ind. 90; Dutchess Mfg. Co. v. Davis, 14 Johns. 238; 7 Am. Dec. 459; Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 124; 43 Am. Dec. 457.

⁶ Bank v. Smalley, 2 Cow. 770; 14 Am. Dec. 526.

⁷ Berks etc. Road Co. v. Myers, 6 Serg. & R. 12; 9 Am. Dec. 402.

tion is the measure of its powers, and the enumeration of these powers implies the exclusion of all others."¹

§ 374. **Or Implied from Nature of Business.**—In addition to the powers given in the charter, all powers necessary for the carrying out of those express powers are impliedly given, and the courts are liberal in construing charters so as to include them.² The right to construct and to own boats includes the right to employ or navigate them;³ to manufacture and sell musical instruments gives authority to purchase of an agent a note which he had acquired by the sale of an article manufactured by the corporation;⁴ to make all contracts necessary for the erection of a specified building gives power to accept an order in favor of a material-man, drawn by the contractor, and payable from the money due the latter by the corporation.⁵ A turnpike company has a right to take and hold under lease premises necessary for storing implements used in road repairs and for sheltering its servants.⁶ A power to carry on an iron furnace confers the power to keep a "supply store" connected therewith.⁷ An association formed to promote municipal reform may expend its money in any way calculated to promote its object.⁸ Authority to construct and maintain a railroad, to make

¹ Thomas v. R. R. Co., 101 U. S. 82; Dartmouth College v. Woodward, 4 Wheat. 636; Perrine v. Canal Co., 9 How. 184; Bellmeyer v. School District, 44 Iowa, 564; Metropolitan Bank v. Godfrey, 23 Ill. 579; Weckler v. First Nat. Bank, 42 Md. 581; 20 Am. Rep. 95; Matthews v. Skinner, 62 Mo. 329; 21 Am. Rep. 425; Overmyer v. Williams, 15 Ohio, 31; Com. v. R. R. Co., 27 Pa. St. 339; Brooklyn Gravel Co. v. Slaughter, 33 Ind. 185; City Council v. Plank Road Co., 31 Ala. 76; Vandall v. South San Francisco Dock Co., 40 Cal. 83; Beach v. Fulton Bank, 3 Wend. 583.

² Whitewater Valley Canal Co. v. Vallette, 21 How. 424; Barry v. Merchants' Ex. Co., 1 Sand. Ch. 289; Old

Colony R. R. Co. v. Evans, 6 Gray, 38; 66 Am. Dec. 394; Union Bank v. Jacobs, 6 Humph. 525; Ohio Life Ins. Co. v. Merchants' Ins. Co., 11 Humph. 22; 53 Am. Dec. 742; Clark v. Farrington, 11 Wis. 333; Willmarth v. Crawford, 10 Wend. 342; Dana v. Bank, 4 Minn. 385; St. Louis v. Weber, 44 Mo. 547; State v. Noyes, 47 Me. 189.

³ Bridgeford v. Hall, 18 La. Ann. 211.
⁴ Western Cottage Organ Co. v. Reddish, 51 Iowa, 55.

⁵ Prairie Lodge Trustees v. Smith, 58 Miss. 301.

⁶ Crawford v. Longstreet, 43 N. J. L. 325.

⁷ Searight v. Payne, 6 Lea, 283.

⁸ Ingham v. Reform Club, 12 Phila. 264.

contracts, and "to do all acts needful to carry into effect the objects for which it was created," gives power to make contracts for transportation for a fixed future period.¹ A corporation organized to manufacture a certain article may assume the filling of a contract made with another for the same article.² Although the charter of a corporation may not, in terms, authorize the company to incur expense, on account of injury received by their employees, yet they may, in exercising such franchises, incur such liability.³ The fact that the articles of incorporation of an institution did not authorize it to raise an endowment fund, was not a prohibition against raising such fund.⁴ A corporation having the right to mine, in organizing another corporation for mining purposes, or in dealing in the stock of such corporation, acts without the scope of its powers.⁵

ILLUSTRATIONS. — A railroad, which extended from Lake Michigan to the Mississippi River, was authorized to make "such contracts as the management of its railroad and the convenience and interests of the corporation might require," and "to build and run as a part of its corporate property such number of steamboats as they may deem necessary," and "to accept from any other state and use any powers or privileges . . . applicable to the carrying of persons and property by railway or steamboat." *Held*, to have the power to employ steamboats belonging to others to carry passengers and freight in connection with its own road: *Green Bay etc. R. R. Co. v. Union Steamboat Co.*, 107 U. S. 98. The charter of a corporation authorized it to purchase and hold, "in fee-simple or otherwise," real and personal estate to the amount of fifty thousand dollars, which was increased by subsequent statutes to six hundred thousand dollars; and provided that it might appropriate its funds to charitable purposes, and that its annual income should be employed, among other purposes, "to promote inventions and improvements in the mechanic arts, by granting

¹ *Cleveland etc. R. R. Co. v. Himrod* *rigues*, 47 Ill. 188; 95 Am. Dec. Furnace Co., 37 Ohio St. 321; 41 Am. 484.
Rep. 509.

² *Louis Cook Mfg. Co. v. Randall*, 62 *Simpson Centenary College v. Bryan*, 50 Iowa, 293.

³ *McMillan v. Carson Hill Union*
Iowa, 244.

⁴ *Toledo etc. R. R. Co. v. Rod- Mining Co.*, 12 Phila. 404.

premiums for said inventions and improvements." Neither the charter nor the subsequent statutes directed the manner in which the provisions for granting these premiums should be carried out. *Held*, that it might purchase land and erect a permanent building thereon, in which to hold exhibitions and its meetings: *Richardson v. Massachusetts Charitable etc. Ass'n*, 131 Mass. 174.

§ 375. Grants of Special Privileges to Corporations Strictly Construed.—On the other hand, grants of special privileges are strictly construed by the courts. Where the corporation claims by virtue of its charter the right to do things which the citizen cannot do, or an exemption from duties to which the citizen is subject, nothing will be presumed in its favor. The proof is on the corporation, and every doubt is construed against the corporation.¹ One clause of a charter is not to be construed in as large a sense as to silence other clauses, where, without violence to the language, a construction can be given which will make all harmonize.² Ambiguous words are to be construed most strongly against the corporation.³ Mere general words in a charter do not authorize the corporation to do acts which are prohibited by the general public law of the state.⁴ Doubtful expressions in a statute conferring franchises are construed to the benefit of the public rather than to that of the corporation.⁵ A legislative intent, upon change or reorganization of a corporation, to absolve it from existing liabilities cannot be inferred.⁶

§ 376. What are Franchises.—A franchise is a right or privilege granted by law. The ordinary franchise granted to a corporation is the right or privilege of acting

¹ *Fertilizing Co. v. Hyde Park*, 97 U. S. 666; *State v. Commissioners*, 23 N. J. L. 510; 57 Am. Dec. 409; *Chesapeake Canal Co. v. Key*, 3 Cranch C. C. 599; *Mohawk Bridge Co. v. R. R. Co.*, 6 Paige, 554; *Cayuga Bridge Co. v. Magee*, 2 Paige, 116; *Auburn Plank Road Co. v. Douglass*, 9 N. Y. 444.

² *McIntosh v. Merchants' Co.*, 9 La. Ann. 403.

³ *Perrine v. Canal Co.*, 9 How. 182.

⁴ *State v. Krebs*, 64 N. C. 604.

⁵ *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

⁶ *University Trustees v. Moody*, 62 Ala. 389.

in a corporate capacity within the limits of the charter. Extraordinary franchises are such as are not essential to the corporate existence, but give additional privileges, — as the right to take property to build a railroad, or to use the public highway, or to take tolls, or the like. The term “franchise” has several significations, and there is some confusion in its use. The better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in the grant. It does not, then, embrace the property acquired by the exercise of the franchise.¹ The franchise of a corporation cannot be levied on for a debt, in the absence of power given either by the charter of the corporation or by the general law.²

§ 377. Franchises cannot be Transferred. — The franchises granted by the state to a corporation cannot be transferred without the state's consent.³ Without legislative authority, a corporation cannot alien its franchises, either absolutely or temporarily, by way of lease.⁴ Neither can franchises be mortgaged without the state's consent.⁵ An act which empowers the leasing of completed railroads only will not authorize the transfer of a franchise for building a railroad.⁶

§ 378. Consolidation of Corporations. — Corporations cannot consolidate without authority from the state, and such authority must be clearly shown.⁷ But where the law

¹ Bridgeport v. R. R. Co., 36 Conn. 255, 266; 4 Am. Rep. 63.

² New Orleans etc. R. R. Co. v. Delamore, 34 La. Ann. 1225.

³ Morawetz on Corporations, sec. 537; Coe v. R. R. Co., 10 Ohio St. 372; 75 Am. Dec. 518.

⁴ Philadelphia v. Western Union Tel. Co., 11 Phila. 327.

⁵ Richardson v. Sibley, 11 Allen, 67; 87 Am. Dec. 700; Com. v. Smith, 10 Allen, 448; 87 Am. Dec. 672; Carpenter v. Mining Co., 65 N. Y. 43; Atkinson v. R. R. Co., 15 Ohio St. 21; Coe v. R. R. Co., 10 Ohio St. 372; 75

Am. Dec. 518; State v. Morgan, 28 La. Ann. 482; State v. Sherman, 22 Ohio St. 428; Bardston v. R. R. Co. v. Metcalfe, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

⁶ Wood v. R. R. Co., 8 Phila. 94.

⁷ Pearce v. R. R. Co., 21 How. 442; Clearwater v. Meredith, 1 Wall. 25; State v. Bailey, 16 Ind. 51; 79 Am. Dec. 405; Aspinwall v. R. R. Co., 20 Ind. 492; 83 Am. Dec. 329; Lauman v. R. R. Co., 30 Pa. St. 42; 72 Am. Dec. 685; McMahan v. Morrison, 16 Ind. 172; 79 Am. Dec. 418.

permits the consolidation of corporations, it is not against public policy for a corporation to be organized with the ulterior purpose of consolidation with another.¹ To merge or consolidate one company with another is generally a measure beyond the authority of an executive committee and directors. It requires the consent of stockholders, and is inoperative as against those who do not agree,² and releases non-consenting stockholders from subscriptions.³ The dissenting stockholders are entitled to withdraw their shares of the capital stock, and may enjoin the consolidation till they are secured.⁴ While a corporation cannot relieve itself from responsibility to those to whom it may be indebted, by becoming merged into a new organization, it may, by the act of merger, become so situated as to be estopped from claiming that it remains undissolved.⁵ Where a new corporation is established in the place of an old one, whose property it purchases, neither this property, excepting so far as it is subject to a prior lien, nor the future earnings of the new company, can be taken to pay the debts of the old one.⁶ A consolidated corporation has no power to declare a dividend, as such, of the earnings made prior to the consolidation by one of the companies which was merged in the consolidation, or dividends on the stock of that company out of the earnings of the consolidated one.⁷ Where a new corporation is formed by amalgamation, under the authority of the state, of two or more distinct corporations into one, it succeeds to all the rights and faculties of the several components, and is subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected.⁸ Where several corporations are united in one,

¹ Hill v. Nisbet, 100 Ind. 341.

² Carey v. R. R. Co., 5 Iowa, 357.

³ Blatchford v. Ross, 54 Barb. 42;

⁴ Bruffett v. R. R. Co., 25 Ill. 353.

Tuttle v. R. R. Co., 35 Mich. 247.

⁵ Chase v. Vanderbilt, 37 N. Y.

⁶ Booe v. R. R. Co., 10 Ind. 93.

Sup. Ct. 344.

⁷ State v. Bailey, 16 Ind. 46; 79 Am. Dec. 406.

⁸ Chicago etc. R. R. Co. v. Moffitt, 75 Ill. 524; State v. R. R. Co., 66 Me. 48.

and the property of the old companies vested in the new, the latter is liable in equity for the debts of the former, at least to the extent of the property received from them; and if it is also liable at law, the latter remedy is not exclusive.¹ Equity cannot dissolve a corporation consolidated from several other corporations on the ground alleged by a stockholder in one of the original corporations, that the consolidation was for a fraudulent purpose, and not legally effected.² An action by a railroad company to enforce payment of a subscription to its stock is not defeated by the fact that pending it the plaintiff has consolidated with another company, and thereby ceased to exist.³ If corporations of different states, by permission of the legislatures, consolidate into one corporation, and as such mortgage the property belonging to one of the consolidated companies, such mortgage is the sole mortgage of said company, and not of all the consolidated companies, and is legal and valid.⁴

The consolidation of corporations chartered by the same state creates a new and distinct corporation.⁵ A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each state, is, nevertheless, in Iowa, a corporation existing there under the laws of that state alone.⁶

ILLUSTRATIONS.—Two boom companies having booms on the same river were consolidated. Both were required by their separate charters to maintain booms sufficiently strong to retain all the lumber contained in them, and by the act of consolidation the company was entitled to all the rights and privileges,

¹ *Harrison v. R. R. Co.*, 4 McCrary, 264.

² *Terhune v. R. R. Co.*, 38 N. J. Eq. 423.

³ *Swartwout v. R. R. Co.*, 24 Mich. 389.

⁴ *Racine etc. R. R. Co. v. Loan and Trust Co.*, 49 Ill. 331; 95 Am. Dec. 595.

⁵ *Clearwater v. Meredith*, 1 Wall.

25; *Shields v. Ohio*, 95 U. S. 319; *Atlanta etc. R. R. Co. v. State*, 63 Ga. 483; *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *McMahan v. Morrison*, 16 Ind. 172; 79 Am. Dec. 418; *Ind. etc. R. R. Co. v. Jones*, 29 Ind. 465; 95 Am. Dec. 654; *Miller v. Lancaster*, 5 Cold. 514.

⁶ *Muller v. Dows*, 94 U. S. 444.

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and subject to all the restrictions, of the former charters. *Held*, that the company was liable for loss by insufficiency of the boom: *Brown v. Boom Co.*, 109 Pa. St. 57; 58 Am. Rep. 708. A corporation acting under a contract of consolidation made mortgages and sold bonds to *bona fide* purchasers for several years. *Held*, that both it and its stockholders were estopped to assert that the contract was *ultra vires*: *Dimpfel v. R. R. Co.*, 9 Biss. 127. A railroad company was consolidated with another, under an act of the legislature, which vested in the new corporation all the powers, rights, franchises, etc., of the old corporations. *Held*, that the new corporation might lawfully use a patented axle-box which both the old corporations had been licensed to use: *Lightner v. Boston etc. R. R. Co.*, 1 Low. 338. Two corporations were empowered by their charters respectively to do all that was necessary to construct and put in operation a railroad between certain places named in the acts of incorporation. *Held*, that the two corporations had no right to unite and place both under the same management, nor to establish a steamboat line to run in connection with the railroads: *Pearce v. R. R. Co.*, 21 How. 441. Two corporations created by the acts of two states for the purpose of constructing a canal were united by new acts, and the stockholders of each were made stockholders of the other. *Held*, that they did not cease to exist as distinct corporations: *Farnum v. Canal Corp.*, 1 Sum. 46. A corporation was chartered to make and sell gas until a certain date. Some time before the charter expired, another corporation was chartered with similar privileges after the said date. It was contemplated that the latter corporation should make preparations before that date. *Held*, that a consolidation of the two corporations on the day preceding that date could be had: *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. While negotiations were pending between two gas companies for their consolidation, upon a certain basis of indebtedness, one of the companies passed a resolution, without the knowledge of the other, declaring a scrip dividend of ten per cent on the amount of their capital stock, with interest, payable at the option of the company, thus increasing their indebtedness to that amount. Certificates of indebtedness were issued in accordance with the resolution. Consolidation was effected between the companies without any knowledge of the other company as to such resolution and such increased indebtedness. *Held*, that the scrip was void: *Bailey v. Citizens' Gas Light Co.*, 27 N. J. Eq. 196.

§ 379. Implied Powers of Corporations—To Purchase and Hold Property.—A corporation has an implied right to acquire and hold property necessary to the carrying

on of its business.¹ A corporation may hold land by tenancy in common, as may a natural person;² or take a mortgage, although unable to take the oath required by statute;³ or purchase and hold any patent the ownership of which is appropriate to enable it to execute the corporate purpose;⁴ or become the assignee of a bond;⁵ or having power to hire buildings, may enter into the usual covenants, as to repair, etc.;⁶ or acquire by transfer title to a note taken in the course of its business, and sue upon the note.⁷ Power to purchase "property deemed desirable in the transaction of its business" gives the corporation power to purchase its own stock.⁸ Land which a corporation cannot hold in its own name it cannot hold in the name of another; and when a corporation cannot hold the legal title to land, it cannot take a beneficial interest in it.⁹

ILLUSTRATIONS.—An agricultural society was authorized "to do all acts necessary for the prosperity of the society in the intervals of the meetings of the board." *Held*, not to give power to purchase real estate: *Tracy v. Guthrie Co. Agric. Soc.*, 47 Iowa, 27. The charter of a railroad gave it power to acquire a strip of land not exceeding one hundred feet wide for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing-places, etc. *Held*, that the corporation had no power to acquire land for purposes of speculation: *Pacific R. R. Co. v. Seely*, 45 Mo. 212; 100 Am. Dec. 369. A charter gave a corporation power to "acquire and hold estate,

¹ *Thompson v. Waters*, 25 Mich. 222; 12 Am. Rep. 243; *Blanchard's etc. Co. v. Warner*, 1 Blatchf. 258; *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378; *Moss v. Averill*, 10 N. Y. 449; *Spear v. Crawford*, 14 Wend. 23; 28 Am. Dec. 513; *The Banks v. Pottiaux*, 3 Rand. 136; 15 Am. Dec. 706; *McCartee v. Orphan Asylum*, 9 Cow. 437; 18 Am. Dec. 517; *Lathrop v. Bank*, 8 Dana, 114; 33 Am. Dec. 481; *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19; 46 Am. Dec. 183; *Callaway Co. v. Clark*, 32 Mo. 305. A corporation in taking a mortgage to secure a debt is not dealing in lands: *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709.

² *Estell v. University of the South*, 12 Lea, 476.

³ *Lincoln Savings Bank v. Ewing*, 12 Lea, 598.

⁴ *Dorsey Harvester Rake Co. v. Marsh*, 6 Fish. Pat. Cas. 387.

⁵ *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 467.

⁶ *Abby v. Billups*, 35 Miss. 618; 72 Am. Dec. 143.

⁷ *Wayland University v. Boorman*, 56 Wis. 657.

⁸ *Iowa Lumber Co. v. Foster*, 49 Iowa, 25; 31 Am. Rep. 140.

⁹ *Coleman v. S. R. T. R. Co.*, 49 Cal. 517.

real, personal, or mixed, and the same to buy, exchange, sell, and mortgage, transfer, pledge, or otherwise encumber or alien, ate, as the board of directors of said association may deem expedient." *Held*, to give it power to loan its surplus funds: *Western Boatmen's Benevolent Ass'n v. Kribben*, 48 Mo. 37. A corporation was authorized by its articles to "purchase and hold, sell or exchange, any real estate or other property deemed desirable in the transaction of its business." *Held*, to have power to buy shares of its own stock: *Iowa Lumber Co. v. Foster*, 49 Iowa, 25; 31 Am. Rep. 140. A statute gave a corporation power to discount non-negotiable notes, and to take, hold, and convey any property, real, personal, or mixed. *Held*, that it might take and hold city warrants: *Aull Savings Bank v. Lexington*, 74 Mo. 104.

§ 380. Implied Powers of Corporations—To Transfer or Dispose of Property.—A corporation has implied au-

thority to transfer or dispose of its property whenever necessary for the purposes of its business.¹ The right of corporations to sell their property is absolute at common law, where they act by a majority of their stockholders; and this right is not limited as to objects, circumstances, or quantity.² A corporation may sell its property to another corporation.³ It may sell its assets to a new corporation, and take the stock of the latter in payment, with the assent of the majority of the stockholders of the old corporation.⁴ A corporation organized for the purpose of owning ditches for the conveyance and sale of water has power to sell and convey all its corporate property, provided the sale is made for corporate or lawful purposes.⁵

¹ *White Water Canal Co. v. Vallette*, 21 How. 424; *Barry v. Merchants' Ex. Co.*, 1 Sand. Ch. 280; *Reynolds v. Commissioners*, 5 Ohio, 204; *Town Council v. Elliott*, 5 Ohio St. 113; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Aurora Agric. Soc. v. Pad-dock*, 80 Ill. 263; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *Burton's Appeal*, 57 Pa. St. 213; *Dupe v. Boston Water Power Co.*, 114 Mass. 37; *Partridge v. Badger*, 25 Barb. 146; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *Dana v. Bank*, 5 Watts & S. 223; *U. S. Bank v. Huth*, 4 B. Mon.

423; *Pierce v. Emery*, 32 N. H. 486; *Story v. Plank Road Co.*, 16 N. J. Eq. 13; 84 Am. Dec. 134. A power to "sell" does not authorize a barter or exchange: *City of Cleveland v. State Bank*, 16 Ohio St. 236; 88 Am. Dec. 445.

² *Treadwell v. Manufacturing Co.*, 7 Gray, 393; 66 Am. Dec. 490.

³ *Warfield v. Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263.

⁴ *Treadwell v. Manufacturing Co.*, 7 Gray, 393; 66 Am. Dec. 492.

⁵ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.

A railroad company, in carrying out an enterprise authorized by its charter, has power to assign its stock subscriptions.¹ Where an insolvent corporation has no means to contest attachment suits, it is not a breach of trust for the directors, on advice of counsel and in good faith, to make an advantageous sale of the corporate assets to an attaching creditor, on condition that he cancel his own debt and discharge the debts of the other attaching creditors.² Where the charter of a corporation only empowers it to sell the real estate necessary for the transaction of its business, when not required for the uses of the corporation, it cannot lease such real estate, nor maintain an action for rent under its lease.³ The stockholders are not in their individual capacities owners of the property as tenants in common, joint tenants, copartners, or otherwise, and a joint deed executed by all the stockholders would convey no title.⁴ A corporation has no right to transfer its franchise, or any property essential to its exercise which it has acquired by right of eminent domain.⁵

§ 381. Implied Powers of Corporations—To Hold Property in Trust.—Formerly, it was held that a corporation could not hold property in trust.⁶ But the rule is now different,⁷ and authority in a corporation to hold in trust will be implied whenever the trust is in furtherance of the general objects of the corporation.⁸ But a

¹ *Downie v. Hoover*, 12 Wis. 174; 78 Am. Dec. 730.

² *White, Potter, etc., Mfg. Co. v. Importing Co.*, 39 Fed. Rep. 864.

³ *Metropolitan Concert Co. v. Abbey*, 52 N. Y. Sup. Ct. 97.

⁴ *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 608.

⁵ *Fietsam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492.

⁶ *Greene v. Dennis*, 6 Conn. 293; 16 Am. Dec. 58.

⁷ "Although it was in early times held that a corporation could not take and hold real and personal estate in trust, upon the ground that there was a defect of one of the requisites to

create a good trustee, viz., the want of confidence in the person, yet that doctrine has long since been exploded as unsound and too artificial; and it is now held that where a corporation has a legal capacity to take real and personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private individual may do": *Story, J.*, in *Vidal v. Girard*, 2 How. 187.

⁸ *In re Howe*, 1 Paige, 214; *Chapin v. School District*, 35 N. H. 445; *Robertson v. Bullions*, 11 N. Y. 243; *Bell Co. v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268; *Deringer v. Deringer*, 5 *Houst.* 416; 1 Am. St. Rep. 150.

corporation cannot be a trustee for purposes foreign to its institution.¹ A corporation authorized by its charter "to receive deposits on trust" may receive money on deposit, and give certificates therefor, and this power is not affected by a proviso prohibiting the corporation from issuing bills, bonds, notes, or other securities, to circulate in the community as money.² Power vested in a corporation "to acquire property by gift, purchase, or otherwise," as fully authorizes it to acquire a leasehold interest in lands and houses for a term or for life as to become the owner thereof in fee.³

§ 382. Implied Powers of Corporations—To Take by Devise.—At common law, a devise of realty to a corporation was not legal. The power of corporations to take property by devise is now generally regulated by statute in the different states.⁴

§ 383. Implied Powers of Corporations—To Borrow Money and Make Debts.—A corporation has an implied power to borrow money and make debts for the purposes of its business.⁵ The power to create debts is treated as an incident to the express powers, and not as in itself one

¹ *Trustees v. Peaselee*, 15 N. H. shall, 23 N. Y. 366; 80 Am. Dec. 317.

² *Talladega Ins. Co. v. Landers*, 43 Ala. 115.

³ *Abby v. Billups*, 35 Miss. 618; 72 Am. Dec. 143.

⁴ *Morawetz on Corporations*, secs. 161, 162; *McCartee v. Orphan Soc.*, 9 Cow. 437; 18 Am. Dec. 516; *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378. A private corporation may take a bequest in trust for religious uses: *Protestant Episcopal Education Society v. Churchman*, 80 Va. 718. A charter of a corporation empowering it "to hold, purchase, and convey" real estate, authorizes it to receive a devise: *American Bible Society v. Marshall*, 15 Ohio St. 537. So authority to take "by direct purchase or otherwise" is an "express authority to take by devise": *Downing v. Mar-*

⁵ *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Tucker v. City of Raleigh*, 75 N. C. 267; *Commissioners v. R. R. Co.*, 77 N. C. 289; *Barry v. Merchants' Ex. Co.*, 1 Sand. Ch. 280; *Partridge v. Badger*, 25 Barb. 146; *Clark v. Titcomb*, 42 Barb. 122; *Curtis v. Leavitt*, 15 N. Y. 9; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Smith v. Law*, 21 N. Y. 296; *Nelson v. Eaton*, 26 N. Y. 416; *Magee v. Canal Co.*, 5 Cal. 258; *Hamilton v. R. R. Co.*, 9 Ind. 359; *Fay v. Noble*, 12 Cush. 1; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Alabama etc. Ins. Co. v. Central Ass. Co.*, 54 Ala. 73; *Moss v. Hespetch Academy*, 7 Heisk. 285; *Union Mining Co. v. Bank*, 2 Col. 248; *Mahoney Mining Co. v. Bank*, 104 U. S. 192.

of the express powers.¹ Authority to borrow includes authority to give evidences of indebtedness.²

§ 384. Implied Powers of Corporations—To Mortgage Property.—The right to mortgage its property is always implied where the right to borrow or to incur a debt is given to the corporation.³ The power to mortgage is included in a power to “sell and dispose of” property;⁴ the right to “use, rent, or sell” hydraulic powers and privileges gives power to mortgage them.⁵ Any corporation, public or private, has capacity, if not prohibited, to make a mortgage as security for a debt contracted in furtherance of the objects of its creation.⁶ Authority to a plank road company to “mortgage the road or other property” permits a mortgage of the franchise of receiving tolls; but not the mortgage of any franchise essentially corporate in its nature, and not enjoyable by a natural person.⁷ A corporation authorized to raise money by mortgage may mortgage to a trustee for creditors.⁸ Goods bought by a corporation *ultra vires* become their property, and they can sell or mortgage them.⁹ The pledging by a turnpike company of their income and tolls is not a mortgage of the road.¹⁰ A corporation, having authority to mortgage its property for the purpose of carrying on its business, is not prohibited by the laws of the state from executing such a mortgage, to secure the payment of

¹ *Smith v. Eureka Flour Mills*, 6 Cal. 1; *Burr v. McDonald*, 3 Gratt. 215.

² *Id.*; *Booth v. Robinson*, 55 Md. 419.

³ *Morawetz on Corporations*, sec. 175; *Aurora Agricultural Society v. Paddock*, 80 Ill. 263; *Thompson v. Lambert*, 44 Iowa, 239; *Watt's Appeal*, 78 Pa. St. 370; *Richards v. R. R. Co.*, 44 N. H. 135; *Bardstown R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; 81 Am. Dec. 541; *Burt v. Rattle*, 31 Ohio St. 116; *Barry v. Merchants' Exchange*, 1 Sand. Ch. 280; *Johnston v. Crawley*, 25 Ga. 316; 71 Am. Dec. 173.

⁴ *Gordon v. Preston*, 1 Watts, 385; 26 Am. Dec. 75. The power to “dispose” of a seat in a stock exchange includes the power to mortgage it: *Clute v. Loveland*, 68 Cal. 254.

⁵ *Willamette Mfg. Co. v. British Columbia Bank*, 119 U. S. 191.

⁶ *State v. Rice*, 65 Ala. 83; *Taylor v. Agricultural and Mechanical Assoc.*, 68 Ala. 229.

⁷ *Joy v. Jackson etc. Co.*, 11 Mich. 155.

⁸ *Wright v. Bundy*, 11 Ind. 398.

⁹ *Parish v. Wheeler*, 22 N. Y. 494.

¹⁰ *Farmers' Turnpike Co. v. Coventry*, 10 Johns. 389.

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money to be thereafter advanced.¹ Authority to mortgage its "road, income, and other property" does not authorize a mortgage of its franchises, though such authority includes the power to make a deed of trust in the nature of a mortgage.² The power of a corporation to pledge securities owned by it for the payment of its debts is included in the power to sell such securities for that purpose.³ Power to pledge franchises and rights of a corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise, and upon which its real value depends.⁴ One who becomes the sole owner of all the corporate stock of a private business corporation may individually make a valid mortgage of its property.⁵ The bonds of a railroad company are not made void by being secured by a mortgage which the company had no power to execute. Nor is the holder's right to recover on such bonds at all affected by a memorandum thereon that they were issued by the company in accordance with its charter, and that the mortgage therein recited had been duly executed.⁶ A mortgage by a corporation to secure a debt in excess of the limit allowed by its articles of incorporation is not for that reason invalid, although given to the directors and share-holders as preferred creditors.⁷

§ 385. Implied Powers of Corporations — To Issue Negotiable Paper.—A corporation has an implied power to issue negotiable paper for the purposes of its business, or to take and negotiate the notes of others.⁸ It

¹ Jones v. New York Guaranty etc. Co., 101 U. S. 622.

² Pullan v. R. Co., 4 Biss. 35.

³ Leo v. R. R. Co., 17 Fed. Rep. 273.

⁴ Phillips v. Winalow, 18 B. Mon. 431; 68 Am. Dec. 729.

⁵ Swift v. Smith, 65 Md. 428; 57 Am. Rep. 336.

⁶ Philadelphia etc. R. R. Co. v. Lewis, 33 Pa. St. 33; 75 Am. Dec. 574.

⁷ Warfield v. Canning Co., 72 Iowa, 666; 2 Am. St. Rep. 263.

⁸ Morawetz on Corporations, sec. 177; Munn v. Commission Co., 15

Johns. 44; 8 Am. Dec. 219; Moss v.

Oakley, 2 Hill, 267; Safford v. Wyck-

off, 4 Hill, 446; Curtis v. Leavitt, 15

N. Y. 173; McIntire v. Preston, 5

Gilm. 48; 48 Am. Dec. 321; Kelley v.

Mayor, 4 Hill, 263; Clark v. School

may guarantee the bonds of another corporation.¹ A corporation authorized to employ its stock solely in advancing money upon goods and selling them upon commission may lawfully accept bills drawn on account of future consignments or deposits of goods, and is bound by its agent's acceptance of such bills.² Authority to "borrow money and issue its bonds therefor" imports power to make negotiable or non-negotiable notes, and give such securities as may be deemed most advantageous.³ A provision prohibiting the corporation from dealing in commercial paper will not extend to the receiving and selling of notes given for the sale of its lands.⁴ Authority "in the prosecution of its business to accept and indorse bills and notes" does not empower it to accept accommodation paper.⁵ The officers of a corporation have no power to authorize the execution of a note for a debt of a third party to the payee, having no relation to the corporate business, and in which the corporation has no interest.⁶ A corporation has power to transfer notes of third parties held by it to secure the payment of its debts.⁷ A corpo-

District, 3 R. I. 199; *Smith v. Eureka Mills*, 6 Cal. 1; *Rockwell v. Bank*, 13 Wis. 653; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Lucas v. Pitney*, 27 N. J. L. 221; *aliter* in England; *Morawetz on Corporations*, sec. 178; *Moss v. Averill*, 10 N. Y. 457, the court saying: "If the corporation could make the purchase, as it has been shown they could, they might lawfully make promissory notes on time for the price; an ability to make a contract implies an ability to make a promissory note. Indeed, the statute 'of promissory notes and bills of exchange' expressly includes corporations having a capacity to make contracts among the persons who may make notes in writing: 1 R. S., 768, secs. 1-3. No question is better settled upon authority than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note, payable either at a future date or upon

demand, when such note is given for any of the legitimate purposes for which the company was incorporated: *Attorney-General v. Life and Fire Insurance Co.*, 9 Paige, 470; *Mott v. Hicks*, 1 Cow. 513; 13 Am. Dec. 550; *Barber v. Mechanics' Insurance Co.*, 3 Wend. 94; *Moss v. Oakley*, 2 Hill, 265; *Safford v. Wyckoff*, 4 Hill, 442; *Kelley v. Mayor of Brooklyn*, 4 Hill, 263; *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137; *Conro v. Port Henry Iron Co.*, 12 Barb. 27."

¹ *Low v. R. Co.*, 52 Cal. 53; 28 Am. Rep. 629.

² *Munn v. Commission Co.*, 15 Johns 44; 8 Am. Dec. 219.

³ *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

⁴ *Buckley v. Briggs*, 30 Mo. 452.

⁵ *Farmers' etc. Bank v. Empire etc. Co.*, 5 Bosw. 275.

⁶ *Hall v. Auburn Turnpike Co.*, 27 Cal. 255; 87 Am. Dec. 75.

⁷ *Clark v. Titcomb*, 42 Barb. 122.

ration which has indorsed negotiable paper for the accommodation of the maker is liable to a *bona fide* holder who has discounted it before maturity in good faith and in the usual course of business.¹ A draft by the secretary on the treasurer of the corporation is but an order of the corporation upon itself, and need not be presented for acceptance, nor need any notice of non-payment be given.² A corporation note given for an individual obligation is presumptively *ultra vires*.³

§ 386. Implied Powers of Corporations—To Sue and be Sued.—A corporation may sue in its corporate capacity. "It may avail itself of any legal or equitable remedy which would be available to an individual under similar circumstances."⁴ It may maintain an action for libel upon averment and proof of special damages.⁵ The words "to sue and be sued" in a charter or act give the corporation no greater powers and subject it to no greater liability than if it was a natural person.⁶ Two corporations may unite in an action to recover money deposited in a bank in their joint names.⁷ The managing agents of a corporation have a right to employ counsel to give legal advice, or to institute legal proceedings.⁸ It may defend legal proceedings taken against its agents in acting for it.⁹ A corporation is such a legal entity that a stockholder may maintain an action against it, either at law or in chancery.¹⁰ The trustees of a stock corporation have not

¹ *Mechanics' etc. Ass'n v. New York etc. Co.*, 35 N. Y. 505.

² *Dennis v. Table etc. Co.*, 10 Cal. 369.

³ *Merchants' Nat. Bank v. Detroit Knitting and Corset Works, Mich.*, 1888.

⁴ *Morawetz on Corporations*, sec. 184. A railroad company may sue in its own name on a written order to deliver stock to "D. A. N., president of the Eastern Railroad Company": *Eastern R. R. Co. v. Benedict*, 5 Gray, 561; 66 Am. Dec. 384.

⁵ *Knickerbocker etc. Ins. Co. v. Ecclesine*, 11 Abb. Pr., N. S., 385; 42 How. Pr. 201.

⁶ *Freeholders v. Strader*, 18 N. J. L. 108; 35 Am. Dec. 530.

⁷ *Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412; *Gathwright v. Callaway County*, 10 Mo. 663.

⁸ *Western Bank v. Gilstrap*, 45 Mo. 419; *Pixley v. R. R. Co.*, 33 Cal. 183; 91 Am. Dec. 623.

⁹ *Morawetz on Corporations*, sec. 235.
¹⁰ *Wilson v. Cheyenne Bank*, 1 Wy. Ter. 108.

power to direct the filing of a petition to have the corporation adjudged a bankrupt.¹ A person about to be damaged by the act of a company assuming to act as a corporation, but not legally organized, may bring his action against such company in the corporate name.² In a suit to enjoin the use of a corporate name, the corporation whose name is alleged to be wrongfully used must be a party plaintiff or defendant. If the corporation refuses to bring such suit upon request, its bond-holder or creditor may do so, and make such corporation a party defendant.³ A railroad corporation having no residence in a certain county cannot there maintain suits against residents of other counties.⁴

§ 387. **Other Acts.**—A corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may make an assignment of its effects, entire or partial, if made *bona fide* for the payment of its debts, the same as any natural person may do.⁵ It may become a joint owner of a ferry.⁶ It has, as incidental to its common-law power to make contracts, a right to make an agreement with an agent to compensate him for obtaining subscriptions to the stock.⁷ A company incorporated to make spermaceti candles may purchase state bonds, and engage to pay for them at a future day.⁸ A statute authorizing a city to subscribe its bonds for certain railroad stock authorizes that railroad to receive the subscription.⁹ A railroad corporation, authorized to buy land for the purpose of procuring stone and other material necessary for the construction of the

¹ Matter of Lady Bryan Mining Co., 2 Abb. 527.

² Newton County Draining Co. v. Hofstinger, 43 Ind. 566.

³ Newby v. R. R. Co., Deady, 609.

⁴ Connecticut etc. R. R. Co. v. Cooper, 30 Vt. 476; 73 Am. Dec. 319.

⁵ Ringo v. Real Estate Bank, 13 Ark. 563; Pope v. Brandon, 2 Stew.

401; 20 Am. Dec. 49; Hopkins v. Gallatin Turnpike Co., 4 Humph. 403.

⁶ Hackett v. R. R. Co., 12 Or. 124; 53 Am. Rep. 327.

⁷ Cincinnati etc. R. R. Co. v. Clarkson, 7 Ind. 595.

⁸ Indiana v. Woram, 6 Hill, 33.

⁹ Clark v. Janesville, 10 Wis. 136; Bushnell v. Beloit, 10 Wis. 195.

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road, has power to buy land for the purpose of getting cross-ties and fire-wood.¹ A corporation may make a valid bond in a judicial proceeding as an appeal bond, reciting that S., "as superintendent of" a certain "rail-road company," and the other persons whose names were signed thereto, "are held and firmly bound," etc.²

A corporation has not the legal capacity to take an oath.³ It has no authority to change its domicile to another state because of authority granted to it to own and manage property in that state.⁴ It has power to waive its legal rights, and is bound by estoppels *in pais* like natural persons.⁵ Corporate acts performed by the body of the corporation sitting out of the state creating it are void.⁶ A corporation may prefer one creditor to another, even though he is a stockholder.⁷ A railroad has no power to guarantee payment of dividends to the subscribers of stock in an elevator company.⁸ A corporation cannot take out letters of administration.⁹

§ 388. **Power of Expulsion of Members.**—The power of expulsion of members is an incident of every corporation, being considered in proper cases a power necessary to their proper government.¹⁰ But under a power to admit members, the directors of a corporation cannot disfran-

¹ Mallett v. Simpson, 94 N. C. 37; 55 Am. Rep. 595.

² Collins v. Hammock, 59 Ala. 448.

³ Alabama etc. R. R. Co. v. Oaks, 37 Ala. 694.

⁴ Aspinwall v. R. R. Co., 20 Ind. 492; 83 Am. Dec. 329.

⁵ Hale v. Ins. Co., 32 N. H. 295; 64 Am. Dec. 370.

⁶ Aspinwall v. R. R. Co., 20 Ind. 492; 83 Am. Dec. 329.

⁷ Warfield v. Canning Co., 72 Iowa, 663; 2 Am. St. Rep. 263; Foster v. Mullanphy Co., 92 Mo. 79.

⁸ Elevator Co. v. R. R. Co., 85 Tenn. 703; 4 Am. St. Rep. 798.

⁹ But it may act as administrator where administrator is not required to take oath or do any act which a

corporation cannot do: Deringer v. Deringer, 5 Houst. 416; 1 Am. St. Rep. 150.

¹⁰ Pilcher v. Board of Trade, 121 Ill. 412; Smith v. Smith, 3 Desau. 557; King v. Richardson, 1 Burr. 517; 2 Kent's Com. 297; Gregg v. Massachusetts Soc., 111 Mass. 185; 15 Am. Rep. 24; Society v. Com., 52 Pa. St. 125; 91 Am. Dec. 139. An injunction indefinitely suspending an officer of a corporation is an indirect mode of effecting his removal, and a court of equity has no power to grant it. The power of a motion belongs to the corporation: Griffin v. St. Louis Vine etc. Assoc., 4 Mo. App. 596. The right to remove a member for improper conduct is incident to every corporation.

chise members.¹ The power of expulsion belongs only to the society at large, unless the charter or some by-law founded on it transfers this power to a select few.² But this power cannot be exercised in the case of companies organized for profit,—the member cannot be deprived of his pecuniary interest without his consent.³ But if the charter provides that shares may be forfeited for non-payment, this may be done.⁴ Where the charter does not specify any distinct grounds for removal, the corporation has an implied power to expel, where the member has been guilty of a crime indictable by the laws of the land,⁵ and infamous, and where he has been guilty of an offense against the corporation itself.⁶ A member of a corporation, a by-law of which provides for the expulsion of a member “who feigns himself sick without being so, or who continues to draw relief after his recovery,” may be expelled for those causes.⁷ Regulations of an asylum for aged seamen, which forbid inmates to leave the premises without permission from the governor or an assistant, and enjoin quiet demeanor at the table, on pain of expulsion, are reasonable regulations, and an expulsion for a breach of them is lawful.⁸ “Vilifying” a fellow-member

¹ Case of Phila. Savings Inst., 1 Whart. 461; 30 Am. Dec. 226.

² Hassler v. Philadelphia Musical Assoc., 14 Phila. 233.

³ People v. Board of Trade, 80 Ill. 134; Leech v. Harris, 2 Brewst. 571; Evans v. Philadelphia Club, 50 Pa. St. 107.

⁴ Evans v. Philadelphia Club, 50 Pa. St. 107; Society v. Commonwealth, 52 Pa. St. 125; 91 Am. Dec. 139; Leech v. Harris, 2 Brewst. 571; Hopkinson v. Exeter, L. R. 5 Eq. 63; Rochler v. Mechanics' Aid Soc., 22 Mich. 86; Davis v. Bank of England, 2 Bing. 393; State v. Tudor, 5 Day, 329; 5 Am. Dec. 162; Delacy v. Neuse River Nav. Co., 1 Hawks, 274; 9 Am. Dec. 636; Ebaugh v. Hendel, 5 Watts, 43; 30 Am. Dec. 291; Waterbury v. Express Co., 3 Abb. Pr., N. S., 163; State v.

Lusitanian Soc., 15 La. Ann. 73; Angell and Ames on Corporations, 238; Hope v. International Financial Soc., W. N. C. (1876) 257.

⁵ Com. v. St. Patrick's Soc., 2 Binn. 448; 4 Am. Dec. 453; People v. Med. Soc., 24 Barb. 570; 32 N. Y. 187; Fawcett v. Charles, 13 Wend. 476; People v. Fire Underwriters, 7 Hun, 248; Society v. Com., 52 Pa. St. 125; 91 Am. Dec. 139.

⁶ Com. v. St. Patrick's Soc., 2 Binn. 448; 4 Am. Dec. 453; People v. Fire Underwriters, 7 Hun, 248; Page v. Board of Trade, 45 Ill. 112; People v. N. Y. Com. Ass'n, 18 Abb. Pr. 271.

⁷ Soc. for Visitation of the Sick v. Commonwealth, 52 Pa. St. 125; 91 Am. Dec. 139.

⁸ People v. Sailor's Snug Harbor, 5 Abb. Pr., N. S., 119.

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is not a good ground of expulsion.¹ Charges that the member of "a society for mutual support and assistance" "assisted, as president of the society, in defrauding the society out of the sum of fifty cents," and "of defaming and injuring the same in public taverns," are not sufficient cause of disfranchisement.²

But a member can in no case be expelled without notice of the intention and the reason for such act, and an opportunity to be heard in his defense.³ A reasonable time must be given in which to answer the charges and produce the testimony; and he is also entitled to be represented by counsel, to cross-examine the witnesses, and to except to the proofs against him.⁴ But when a member has been convicted by a jury of an infamous crime, a vote of expulsion would be legal without any notice or preferment of charges, however necessary those ceremonies might be when the offense concerned the corporate interests.⁵

ILLUSTRATIONS.—A private corporation or club owning property, and at liberty to accumulate more, expelled one of its members for quarreling with and striking another member within the walls of the club-house. *Held*, that the club had no authority for such expulsion, in the absence of any provision therefor in the charter: *Evans v. Philadelphia Club*, 50 Pa. St. 107. The articles of a corporation authorized the expulsion of a member for scandalous or improper proceedings, which might

¹ *Com. v. St. Patrick's Soc.*, 2 Binn. 448; 4 Am. Dec. 453.

² *Commonwealth v. German Soc.*, 15 Pa. St. 251.

³ *Black and White Smiths' Soc. v. Vandyke*, 2 Whart. 309; 30 Am. Dec. 263; *Green v. Afr. Meth. Epis. Soc.*, 1 Serg. & R. 254; *Com. v. Penn. Ben. Inst.*, 2 Serg. & R. 141; *Com. v. Guardians*, 6 Serg. & R. 469; *Com. v. Pike Ben. Soc.*, 8 Watts & S. 247; *Washington Soc. v. Bacher*, 20 Pa. St. 425; *Fuller v. Plainfield Acad.*, 6 Conn. 523; *Barrows v. Med. Soc.*, 12 Cush. 402; *People v. St. Franciscus Ben. Soc.*, 24 How. Pr. 216; *People v. N. Y. Com. Ass'n*, 18 Abb. Pr. 271; *People v. Sailor's Snug Harbor*, 54 Barb. 532;

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Delacy v. Neuse Riv. Co., 1 Hawks, 274; 9 Am. Dec. 636; *South Plank Road Co. v. Hixon*, 5 Ind. 165; *Leech v. Harris*, 2 Brewst. 571; *White v. Brownell*, 2 Daly, 329; *Sibley v. Carteret Club*, 40 N. J. L. 295; *State v. Chamber of Commerce*, 47 Wis. 673; *contra: Manning v. San Antonio Club*, 63 Tex. 166; 51 Am. Rep. 653.

⁴ *State v. Bryce*, 7 Ohio, 414; *Rex v. Richardson*, 1 Burr. 540; *Rex v. Liverpool*, 2 Burr. 734; *Murdock v. Academy*, 12 Pick. 244; *Rex v. Chalke*, 1 Ld. Raym. 226; *Rex v. Derby*, Cas. temp. Hardw. 154.

⁵ *Angell and Ames on Corporations*, 246.

injure the reputation of the society. *Held*, to be a good cause of expulsion, that a member claiming relief from the society had altered the amount of a physician's bill from four dollars to forty dollars, and had presented the bill to the president as the basis of his claim: *Commonwealth v. Philanthropic Soc.*, 5 Binn. 486. The charter of an incorporated company stated that the company was formed, among other things, "to inculcate just and equitable principles in trade." *Held*, that they might expel a member for obtaining goods under false pretenses, though the offense was not committed within the local jurisdiction of the corporation, nor against a member thereof: *People v. N. Y. Commercial Ass'n*, 18 Abb. Pr. 271. A corporation was empowered by its charter to expel members in the manner to be prescribed by its rules and by-laws. A by-law provided for the expulsion of a member for non-fulfillment of any contract, whether written or verbal. *Held*, that the by-law was reasonable, and authorized the expulsion of a member refusing to perform a contract void by the statute of frauds: *Dickenson v. Chamber of Commerce of Milwaukee*, 29 Wis. 45; 9 Am. Rep. 544. A medical society under power to make by-laws contained in its charter adopted a law providing for the expulsion of a member who shall be guilty of ungentlemanly conduct during a session of the society, or shall conduct himself out of the society in such a manner as would render him ineligible to membership. *Held*, valid; but the society has not an uncontrollable discretion in its construction and enforcement: *State v. Georgia Med. Soc.*, 38 Ga. 608; 95 Am. Dec. 408.

§ 389. Remedies for Wrongful Expulsion—Restoration.—When a member of a corporation is illegally removed, he may be restored by application to the court. The remedy is by *mandamus*.¹ Equity will not enjoin a private corporation from expelling a member for violating the by-laws; his remedy, if any, is at law.² A person

¹ *Burrows v. Mass. Med. Soc.*, 12 Cush. 402; *Crocker v. Old South Soc.*, 106 Mass. 489; *Sleeper v. Franklin Lyceum*, 7 R. I. 523; *People v. St. Francis Soc.*, 24 How. Pr. 216; *People v. Med. Soc.*, 24 Barb. 570; *People v. St. Stephen's Church*, 6 Lans. 172; *People v. Ben. Soc.*, 3 Hun, 361; *Delacy v. Neuse Riv. Co.*, 1 Hawks, 274; 9 Am. Dec. 636; *State v. Georgia Med. Soc.*, 38 Ga. 608; 95 Am. Dec. 408; *State v. Lusitanian Soc.*, 15 La. Ann. 73; *People v. Mich. Aid Soc.*, 22

Mich. 86; *State v. Chamber of Com.*, 20 Wis. 68; *Society v. Com.*, 52 Pa. St. 125; 91 Am. Dec. 139; *Com. v. Soc.*, 2 Binn. 441; *Franklin Ben. Soc. v. Com.*, 10 Pa. St. 357; *Com. v. German Soc.*, 15 Pa. St. 251; *Evans v. Phila. Club*, 50 Pa. St. 107; *Cook v. College of Physicians*, 9 Bush, 541; *Black and White Smiths' Soc. v. Vandyke*, 2 Whart. 309; 30 Am. Dec. 263; *Sibley v. Carteret Club*, 40 N. J. L. 295.
² *Sturges v. Chicago Board of Trade*, 86 Ill. 441.

having been suspended as a member of the stock exchange, on his confession of insolvency, cannot be reinstated, or maintain any claim against the association, except in accordance with its rules; and where they provide an ample remedy, equity will not relieve.¹ One who for nineteen years has acquiesced in his expulsion from the membership of a corporation for non-payment of corporate dues will not be reinstated by the court.²

§ 390. May do Business in Foreign State.—In the absence of any limitation in its charter, a corporation may do business outside the state which chartered it;³ provided, of course, that it has the consent of the foreign state. But it should have its central office, or place of management, within the state which gave it its charter.⁴ A corporation cannot enact or pass a by-law, or any rule or resolution for its government, except within the state under whose laws it is organized, and where it has a corporate existence.⁵

§ 391. May Employ Surplus of Money or Property to Best Advantage.—A corporation which has a surplus of money or property is not obliged to let it remain idle because it is unable to use it for the purposes for which the company was formed. It may employ such surplus in the most profitable manner it can.⁶

¹ *Moxey v. Philadelphia Stock Exchange*, 14 Phila. 185.

² *Bostwick v. Detroit Fire Department*, 49 Mich. 513.

³ *Bank of Augusta v. Earle*, 13 Pet. 558.

⁴ *State v. R. R. Co.*, 45 Wis. 579.

⁵ *Mitchell v. Vermont Copper Min. Co.*, 40 N. Y. Sup. Ct. 406.

⁶ *Simpson v. Hotel Co.*, 8 H. L. Cas. 712; *Forrest v. R. R. Co.*, 30 Beav. 40. In *Brown v. Winnisimmet Co.*, 11 Allen, 326, a ferry company was held to have power to lease its surplus boats to other parties. "We know of no rule," said the court, "or principle,

by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly, the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the

§ 392. May Alter its Business to Suit Changes of Time or Circumstances. — "It is implied in the formation of every corporation that it shall adapt itself to changes of time and circumstances, and that it may avail itself of any new appliances or inventions which are deemed necessary or convenient to a successful prosecution of its business. . . . This is no departure from the original agreement of the corporators, although the latter could not possibly have contemplated the alterations which time and events have brought about."¹ Thus it has been held that a corporation, chartered to purchase lands and create water power by the erection of dams, might, after changes in the country had made water privileges of little account, raise the grade of its lands, and then sell them;² that a

care and management of the property which it is authorized to hold under the act by which it was created. For example, it might perhaps be held that a corporation established for the purpose of manufacturing cotton and woolen cloth could not properly invest all its capital in mill powers and privileges, and engage exclusively in the business of leasing them to others to be used for manufacturing purposes, or that it could not lawfully confine its operations to the making of steam-engines and machines for sale. But no one could doubt that it would be within the scope of its powers to allow another person or corporation, for a reasonable compensation, to draw surplus water from its mill-pond, or to employ that portion of its steam power which was not required for its own use. So a stage-coach company or a street-railway corporation would exceed its corporate powers if it engaged extensively in the transportation of passengers and merchandise on land or sea by steam; but it would be acting strictly within the limits of its capacity if it should occasionally let a horse, or a coach, or a car, not required for its own immediate purposes, to another person or corporation, or should enter into a contract for the employment of its horses in another occupation during a portion of the year, when the business of the corporation did not require their

use. We can see no substantial difference between transactions of this character and that which the defendants entered into when they made the contracts with the plaintiffs."

¹ Morawetz on Corporations, sec. 192.

² *Dupree v. Boston Water Power Co.*, 114 Mass. 37, the court saying: "It is contended that a sale of the lands of the corporation in the mode proposed would be a breach of trust. This depends upon the question whether a sale on such terms is by reasonable implication within the chartered powers of such a corporation. It is not enough that the proposed action may be shown to be prejudicial to the general corporate interests, if it is not illegal, and if it equally affects all the corporators. Regard must be had to the peculiar situation of the property. The increase of population since the original act of incorporation has given greatly increased value to the lands acquired by the company. The business of the company can no longer be profitably confined to the development and use of its water privileges. It has, by contract with the commonwealth, the city, and other owners of land, extinguished its water power, and now owns instead thereof extensive and valuable tracts of land, over which it had originally only the right to flow. This change in its business

canal company may widen and deepen its canal to meet the requirements of greater traffic;¹ that a manufacturing company may buy new machinery and patents;² that a land improvement company may build a saw-mill and a hotel;³ that a manufacturing company may open a shop to supply its employees with necessities;⁴ that a railroad company may agree to carry beyond its line.⁵ A company incorporated "for the purpose of manufacturing and selling glass" may purchase glassware to supply their customers, while repairing their works.⁶

§ 393. Power to Issue Preferred Stock.—Preferred shares are those the owners of which are entitled to profits to a certain extent in preference to other shareholders. The holders of such shares are not creditors of, but stockholders in, the company. They differ from other share-holders only in being entitled, as against them, to payment of dividends in priority to them. Preferred, preference, preferential, or guaranteed shares, as they are indifferently called,⁷ are usually issued by companies who have expended their original capital for the purpose of obtaining further capital, and therefore where the authority to issue preference stock is given, it is necessary that it shall be employed for that purpose alone, and the com-

has made it necessary to fill in and improve the land, that it might be made available as assets of the company, and this necessity has been recognized by a resolve of the legislature authorizing an increase of capital for that purpose: Res. 1856, c. 76. There is nothing in the general laws of the commonwealth, or in the company's charter, which forbids the sale proposed. The power to purchase and hold implies the power to sell, and to sell upon such terms as to secure the highest price. The whole capital is now represented by these lands from the sale, and not from the income or use, of which the share-holders must derive their return. In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may

receive it in pledge or in payment in the lawful exercise of its corporate powers: *Leland v. Hayden*, 102 Mass. 542; *American Railway-Frog Co. v. Haven*, 101 Mass. 398; 3 Am. Rep. 377; *Nesmith v. Washington Bank*, 6 Pick. 324, 329; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74; *City Bank of Columbus v. Bruce*, 17 N. Y. 507; *Ex parte Holmes*, 5 Cow. 426."

¹ *Selden v. Delaware Canal Co.*, 29 N. Y. 634.

² *In re British etc. Cork Co.*, L. R. 1 Eq. 231.

³ *Watt's Appeal*, 78 Pa. St. 370.

⁴ *Dauchy v. Brown*, 24 Vt. 197.

⁵ See *post*, title *Bailments; Carriers*.

⁶ *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315.

⁷ *Henry v. R. R. Co.*, 4 Kay & J. 1.

pany cannot, for example, pay dividends with such stock.¹ The issue of preferred stock cannot be justified except for the purpose of strengthening the company's standing or enlarging its business. The corporation has reached a crisis in its affairs; the stockholders are unable or unwilling to sink more money in the enterprise, but yet are ready to give to those who will do so a preference in any profits which the increased means may enable the concern to make. These considerations render the transaction fair and equitable.² A distinction is made by the courts between dividends or interest upon preferred stock, and upon common stock, and it is this: that as to the latter, their declaration is discretionary with the directors; while as to the former, the question of ability to pay will be decided by the court, and the decision of the directors is not conclusive.³ Equity will compel directors of a corporation to declare dividends in favor of holders of preferred stock who are shown to be entitled thereto.⁴ Preferred stock cannot be issued without express or implied authority in the charter, unless with the assent of all the stockholders. The effect of it would of course be to impair the contract of the original stockholders, which could not be done against their wishes.⁵ A power to borrow money does not give

¹ *Hoole v. R. R. Co.*, L. R. 3 Ch. App. 262.

² *Lockhardt v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156.

³ *Barnard v. R. R. Co.*, 7 Allen, 512; *Bryant v. Ohio College*, 1 Cin. 67; *Dickinson v. R. R. Co.*, 7 W. Va. 390; *King v. R. R. Co.*, 9 Rep. 431; *Furness v. R. R. Co.*, 25 Beav. 614; *Chase v. Vanderbilt*, 37 N. Y. 334.

⁴ *Hazeltine v. R. R. Co.*, 79 Me. 411; 1 Am. St. Rep. 331.

⁵ *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. In *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drew. & S. 514, 4 De Gex, J. & S. 672, the court said: "I think it is clear that this is a case for an injunction. There is a memorandum of association which prescribes that the capital of the company shall be one hundred and twenty

thousand pounds, to be divided into twelve thousand shares, of ten pounds each. In the articles of association, there are provisions in regard to the payment of the dividends, that they shall not be paid out of capital, and that when dividends are paid to the shareholders they are to be in proportion to the shares which they hold. So that when any person takes a number of shares in this company a contract is entered into between him and the general body of shareholders, to the effect that all those who have taken or shall take any of the twelve thousand shares shall have a ratable dividend, whenever there is a dividend, in proportion to their respective shares. This is the contract between the parties. The question then really comes to this: Can the majority of the

authority to issue preferred stock.¹ But where such stock was secured by bond and mortgage, the holders being expressly prohibited by statute from being members of the corporation,² where the preferred stock was surrendered, and a bond and mortgage taken in its stead, the preferential share-holders thereafter not being entered as members of the corporation,³ where there was a provision for the redemption of the stock,⁴ and where there was a condition for payment of interest until the company should go into operation,⁵ — in all these cases the proceedings were adjudged not *ultra vires*, being looked upon as in the nature of loans.

But where the charter authorizes the issue of preferred stock, no question as to the power to issue it can be raised by a dissenting stockholder.⁶ And where its issue is agreed to by all the stockholders, it is, of course, legal.⁷ The legislative authority may be given subsequent to the organization of the corporation.⁸ The issue of preferred stock may be acquiesced in, so as to bar the other stockholders from objecting, from their recognizing

share-holders, in order to induce persons to take some of these twelve thousand shares, which are not yet issued, authorize the directors to make an arrangement for giving to them, not that which all the existing share-holders contracted should be given, viz., a dividend in proportion to their shares, but a preferential dividend, so that every one who has contracted that he shall have a proportionate dividend with all those who take any of the twelve thousand shares will no longer have a proportionate dividend, but his dividend will not be paid at all or at least suspended, until other persons who shall have been induced to take some of these twelve thousand shares shall have been paid their dividend in full? That is a clear breach and violation of the contract which the parties entered into. It is not necessary that there should be a case of fraud in the moral sense of the term. It is a breach of contract, and

that the directors have no right to commit."

¹ Kent v. Quicksilver Mining Co., 78 N. Y. 159.

² Burt v. Rattle, 31 Ohio St. 116.

³ Totten v. Tison, 54 Ga. 139.

⁴ Westchester etc. R. R. Co. v. Jackson, 77 Pa. St. 321.

⁵ Richardson v. R. R. Co., 44 Vt. 613.

⁶ Matthews v. R. R. Co., 48 L. J. J. Ch. 375; Henry v. R. R. Co., 1 De Gex & J. 606; Taft v. R. R. Co., 8 R. I. 310; 5 Am. Rep. 575; St. John v. R. R. Co., 10 Blatchf. 271; 22 Wall. 136; Davis v. Proprietors, 8 Met. 321; In re Anglo-Danubian Steam Nav. Co., L. R. 20 Eq. 339.

⁷ Prouty v. R. R. Co., 1 Hun, 635.

⁸ Rutland etc. R. R. Co. v. Thrall, 35 Vt. 536; City of Covington v. Covington etc. Bridge Co., 10 Bush, 69; Midland R. R. Co. v. Gordon, 16 Mees. & W. 804.

it at corporate meetings;¹ and especially where it has passed into the hands of innocent holders.²

§ 394. **Rights of Preferred Stockholders.**—Interest or dividends to preferred stockholders can be paid only out of the profits actually earned.³ Therefore, an express guaranty to pay a certain dividend on preferred stock entitles the holders only to such dividends when there are profits out of which they can be paid.⁴ But arrears in one year may be made up, it seems, from profits earned in subsequent years.⁵ In declaring dividends on preferred stock, the arrearages of one year cannot be paid out of the earnings of a subsequent year, when the by-law of the corporation upon the subject implies that the entire net earnings of each year shall be paid out in dividends.⁶ But preferred stockholders are entitled to dividends from earnings on hand without first making provision for the payment of the principal of the bonded debt, where the corporation is in good circumstances and credit, and could doubtless provide for an extension of the time for paying such debt, or make payment by the issue of other bonds.⁷ Preferred stockholders have no control over the corporation which is not enjoyed by common stockholders; the difference between them is simply this: that the one class is to be first paid out of a certain fund, to the exclusion of the other, if that fund be inadequate to pay both.

¹ Lockhart v. Van Alstyne, 31 Mich. 76; 18 Am. Rep. 156.

² Kent v. Quicksilver Min. Co., 12 Hun, 53; 78 N. Y. 159; Hoyt v. Quicksilver Min. Co., 17 Hun, 169.

³ McDougall v. Jersey Imperial Hotel Co., 2 Hem. & M. 528; Pitts. etc. R. Co. v. Allegheny Co., 63 Pa. St. 120; Curran v. Arkansas, 15 How. 304; Bates v. R. R. Co., 49 Me. 491; Taft v. R. R. Co., 8 R. I. 310; 5 Am. Rep. 575. In Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156, it was held that an agreement by a corporation to pay annual dividends to preferred stockholders, without ref-

erence to its ability to pay them from earnings, was void.

⁴ Lockhart v. Van Alstyne, 31 Mich. 76; 18 Am. Rep. 156; Taft v. R. R. Co., 8 R. I. 310; 5 Am. Rep. 575.

⁵ Henry v. R. R. Co., 1 De Gex & J. 606; Matthews v. R. R. Co., 28 L. J. Ch. 375; Lockhart v. Van Alstyne, 31 Mich. 76; 18 Am. Rep. 156; Taft v. R. R. Co., 8 R. I. 310; 5 Am. Rep. 575; Prouty v. R. R. Co., 1 Hun, 655.

⁶ Hazeltine v. R. R. Co., 79 Me. 411; 1 Am. St. Rep. 330.

⁷ Hazeltine v. R. R. Co., 79 Me. 411; 1 Am. St. Rep. 331.

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The corporation is no more a trustee for the holders of preferred stock than for the holders of common stock, and consequently the former have no right to complain of acts of the directors, which simply make it less likely that the particular fund from which they expect to be paid will prove sufficient to satisfy their claims. Therefore, the execution of a mortgage upon the whole line of a railroad, for the purpose of raising funds for the company, and subsequent to the issuance by the corporation of preferred stock, is not in derogation of the rights of the preference share-holders, and an injunction will not issue to restrain the execution of such mortgage;¹ and so preferred stockholders who are entitled to receive interest in preference to the payment of dividends on the common stock, and after payment of the mortgage interest, are not to be considered prejudiced by the corporation issuing mortgage bonds consolidating prior and subsequent indebtedness.² Owners of preferred railroad stock entitled to an annual non-accumulating dividend, dependent on a declaration of profits by a board of directors, which has reported more than sufficient net profits for the payment of the dividend, but which has determined to use it all for the improvement of the road, can compel payment to themselves.³ Where an option was given to common stockholders to become preferred ones by surrendering their stock before a given day, a stockholder who receives no notice in time to make the exchange, on account of his living abroad, is not entitled to relief.⁴ So where an option was given to convert loan notes into shares within a given time,⁵ and where by the terms of a railroad bond a time was fixed within which it might be converted into stock if the holder so desired, an extension of the time of payment of the bond was held not to extend the time of

¹ Garrett v. May, 19 Md. 177.

² Thompson v. R. R. Co., 42 How. 575.
 Pr. 68; 11 Abb. Pr. 188; 45 N. Y.
 468.

³ Nickals v. R. R. Co., 15 Fed. Rep.

⁴ Pearson v. R. R. Co., 14 Sim. 541.

⁵ Campbell v. R. R. Co., 5 Hare, 519.

the right of conversion.¹ Preferred stock was entitled to preferred dividends "out of the net earnings of the road, . . . after payment of mortgage interest and delayed coupons in full." Subsequent to the issue of this stock, the company leased new roads, and borrowed money for the repair and equipment of the road, as it had power to do. The rent of the new road and the interest on this borrowed money, it was held in the supreme court of the United States, had priority over the preferred stock.² Where the certificate of preferred stock provides that after the payment of the guaranteed per cent the preferred stockholders shall share in any surplus beyond a certain per cent which may be divided upon the common stock, such preference share-holders are, after receiving their guaranteed per cent, to be deferred until the common share-holders have received their specified per cent, and then all stockholders are to be on the same footing as to any remaining surplus.³

The right of the holders of preferred stock extends only to a priority as to dividends; as to assets or capital, they stand in the same position as ordinary share-holders.⁴

¹ *Muhlenberg v. R. R. Co.*, 47 Pa. St. 16.

² *St. John v. R. R. Co.*, 10 Blatchf. 271; 22 Wall. 137.

³ *Bailey v. R. R. Co.*, 1 Dill. 174; 17 Wall. 96.

⁴ In *re London Rubber Co.*, L. R. 5 Eq. 519. Where the power was express, preference capital was issued by an English corporation, and its validity sustained: In *re Bangor etc. Slab Co.*, L. R. 20 Eq. 59. So in an American case, where it was allowed by statute: *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181. The rule was clearly laid down in an English case, *Griffith v. Paget*, L. R. 6 Ch. Div. 511, in these words: "These companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the same considerations. If in an ordinary commercial partnership one or more of the partners has a larger share of the

profits than is the proportion borne by his share of the capital to the capital of the others, whether on account of his services (which is the more frequent ground in cases of partnership for giving the larger share), or on account of the services of others formerly given to the partnership, which is sometimes done, especially in the case of a second or third generation, that privilege ceases when the partnership is dissolved. If you give an annuity out of profits to a widow during the continuance of the partnership, she having no share of the capital, of course that *ex vi termini* will come to an end at the dissolution of the partnership. If you give a managing partner a salary, or a larger share of profits than his proportion of the capital, of course, at the dissolution, the management comes to an end and his larger share of profits. But in the ordinary case, when the profits are unequally

ILLUSTRATIONS.—A corporation authorized to issue preferred stock after it had received a certain sum for each share, which should be payable on dissolution in full next after the payment of debts, guaranteed that it “shall receive semi-annual dividends of four dollars on each share.” *Held*, that the guaranty was absolute, and independent of the profits earned: *Williams v. Parker*, 136 Mass. 204. A supplement to the charter of a corporation authorized issuance of preferred stock, and provided “that when so issued, the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company.” *Held*, that holders of preferred stock were entitled to such dividends, up to seven per cent, as the profits of a particular year would yield, before any dividends were paid to the common stockholders, although the deficiency of profits in one year was not to be made up in another year; and when a holder of preferred stock failed to claim his rights in certain years, a subsequent owner thereof could claim reimbursement: *Elkins v. R. R. Co.*, 36 N. J. Eq. 233.

§ 395. **No Implied Power to Alter Charter.**—The charter of the corporation cannot be altered without the consent of the legislature,¹ and the consent of every member of the corporation.² A legislature, under an express

divided, that is, unequally as regards the share of the capital, the same rule prevails, and that is quite independent of the circumstance whether the excess of profits is given for services, or given to a sleeping partner for the use of his name or otherwise. When the partnership comes to an end, the right to the share of the profits comes to an end also; and you distribute the assets, after providing for the profits earned up to the time of the dissolution in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership. Therefore, you would distribute the assets simply in proportion to the capital. This is a commercial partnership subject to certain statutory provisions. Therefore, if there were no provision to be found anywhere, you would distribute the assets in proportion to the capital, and the mere arrangement for the division of profits *inter se* during the

continuance of the partnership would have no direct bearing on the division of the capital, as distinguished from profits earned up to the time of the dissolution, after the dissolution of the company.”

¹ Morawetz on Corporations, sec. 196.

² Morawetz on Corporations, sec. 196; *Union Locks Co. v. Towne*, 1 N. H. 44; 8 Am. Dec. 33; *Com. v. Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450; *Brown v. Fairmount Mining Co.*, 10 Phila. 32; *contra* in New York and Massachusetts: See Morawetz on Corporations, sec. 202. In *Zabriskie v. R. R. Co.*, 18 N. J. Eq. 191, 90 Am. Dec. 627, the court say: “The decisions in the cases of *Banet v. R. R. Co.*, 13 Ill. 504, *Pacific R. R. v. Renshaw*, 18 Mo. 210, and *Pacific R. R. v. Hughes*, 22 Mo. 291, 64 Am. Dec. 265, hold that the majority of the stockholders, by authority of the legislature, may make a change, pro-

reservation of power to "repeal, alter, or modify" the charter of a private corporation, cannot modify it without the consent of the corporation. But if the corporation refuses to accept a statutory modification, it must cease to transact business in a corporate capacity.¹ Whenever a corporation accepts a material alteration of its charter from the legislature, by regular action of the stockholders in general meeting duly organized, the act is binding upon each individual member, unless he shall expressly dissent therefrom before any debts are contracted or rights inure to third parties in carrying out the new designs or enterprise.² If a statute, in force at the time a subscription to the capital stock of a railroad company is made, authorizes an extension of the line of the road, the subsequent exercise of such power by the company will not affect the subscription.³

§ 396. What not "Alterations" — Grant of Additional Franchises — Discharge of Obligations to State. — But the

vided it is not great or a radical one. They, in express terms, say that a change like this would not be warranted, and so far as of authority are on the side of the complainant. But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may, by authority from the legislature, change the object of the enterprise in small things, there is no principle of law by which they can be restrained in any a little larger or in the character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for banking or insurance business, or for a canal, theater, brewery, or beer saloon. There is no other alternative to the proposition that while the power reserved authorizes the legislature, within certain limits, to make such alterations as they choose to impose, it gives no authority, when the legislature does not impose them, for the majority to adopt such alterations or

enter upon such enterprises as are allowed by the legislature. Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change."

¹ *Yeaton v. Bank of the Old Dominion*, 21 Gratt. 593.

² *Martin v. R. R. Co.*, 8 Fla. 370; 73 Am. Dec. 713.

³ *Jewett v. R. R. Co.*, 34 Ohio St. 601.

grant of additional franchises by the legislature to the corporation is not an alteration, and may be accepted by a majority of the incorporators.¹ So, also, the discharge of obligations due the state by the corporation is not an alteration of the charter within the last section.² An act extending the charter is valid as to creditors without acceptance.³ An alteration in the charter increasing the number of directors may be accepted by a majority of the stockholders.⁴ Amendments which are necessary to carry into effect its main design may be made without the consent of a share-holder; but not an amendment which fundamentally changes the object and purposes of the act of incorporation.⁵ A subscriber to the capital stock of a company, who agrees to be subject to the rules and regulations which may from time to time be adopted by the directors, cannot avoid payment because the charter has been amended, reducing the number of days of notice to be given, if the amendment of the charter has been accepted.⁶

ILLUSTRATIONS.—An agricultural society's object was "to improve the condition of agriculture, horticulture, and the mechanic and household arts." It was reorganized into a joint-stock company, "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," the name being changed only by substituting the word "board" for "society." The old society provided for holding annual fairs, and the new for annual fairs and exhibitions. *Held*, that there was no substantial change in the objects of the society: *Livingston County Agricultural Society v. Hunter*, 110 Ill. 155.

§ 397. Effect of Alteration on Stockholder's Liability.

—A subscriber to the capital stock of a corporation is

¹ *Fry v. R. R. Co.*, 2 Met. (Ky.) 322; 470; *Milford v. Brush*, 10 Ohio, 111; *Irwin v. Turnpike Co.*, 2 Penr. & W. 466; 23 Am. Dec. 53; *Gray v. Monongahela Nav. Co.*, 2 Watts & S. 156; 37 Am. Dec. 500; *Pacific R. R. Co. v. Hughes*, 22 Mo. 291; 64 Am. Dec. 265; *Cross v. R. R. Co.*, 90 Pa. St. 392.

² *Joy v. Jackson Plank Road Co.*, 11 Mich. 155; *Wilson v. R. R. Co.*, 33 Ga.

36 Am. Dec. 78.

³ *Vose v. Handy*, 2 Me. 322; 11 Am. Dec. 101.

⁴ *Mower v. Staples*, 32 Minn. 284.

⁵ *Fry v. R. R. Co.*, 2 Met. (Ky.) 314.

⁶ *Illinois River R. R. Co. v. Beers*, 27 Ill. 185.

discharged from his liability on his subscription by the alteration of the charter by the legislature, even though the alteration is adopted by a majority of the stockholders.¹ But the rule is different where the legislature has reserved the right at the beginning to amend or alter the charter.²

ILLUSTRATIONS.—The defendant subscribed for stock in the B. & C. Railroad Company; the legislature changed the terminus from B. to M., and authorized the company to run a line of steamers beyond their terminus. *Held*, that the defendant was released from his subscription: *Marietta etc. R. R. Co. v. Elliott*, 10 Ohio St. 57; *Thompson v. Guion*, 5 Jones Eq. 113. A had contracted to take a share in a corporation created for the purpose of making a river navigable, and empowered to hold real estate not exceeding 100 acres, and to collect a toll for forty years, not exceeding twelve per cent per annum on the amount of money expended; and afterwards the legislature, on the petition of the corporation, but without the consent of A, authorized them to hold real estate to the amount of one hundred acres, and to collect a toll unlimited as to its amount and duration. *Held*, that A was discharged from his contract, and not liable for any subsequent assessment on the share: *Union Locks and Canals v. Towne*, 1 N. H. 44; 8 Am. Dec. 32.

§ 398. No Implied Power to Engage in Business outside of That Which It was Chartered to Carry on.—There is no implied authority in a corporation to engage in a business outside of the particular business it was chartered to carry on.³ Thus it has been held that a railroad company has no implied power to purchase and hold land for speculation and sale,⁴ nor a coal-mining company to buy coals in the market as a speculation,⁵ nor a toll-bridge company to build a wharf and rent it,⁶ nor a railroad to trade in coals,⁷ or become a steamboat company, or carry

¹ *Hartford etc. R. R. Co. v. Croswell*, 5 Hill, 383; 40 Am. Dec. 354; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 606; *McCullough v. Moss*, 5 Denio, 580; *Bank v. Charlotte*, 85 N. C. 433.

² *Northern R. R. Co. v. Miller*, 10 Barb. 260.

³ *Clark v. Farrington*, 11 Wis. 306; *Waldo v. R. R. Co.*, 14 Wis. 575.

⁴ *Rensselaer R. R. Co. v. Davis*, 43 N. Y. 137; *Pacific R. R. Co. v. Seeley*, 45 Mo. 212; 100 Am. Dec. 369.

⁵ *Alexander v. Cauldwell*, 83 N. Y. 480.

⁶ *Toll-bridge Co. v. Osborn*, 35 Conn. 7.

⁷ *Attorney-General v. R. R. Co.*, 1 Drew. & S. 154.

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on a brewery,¹ nor a fire or life insurance company to do a marine business,² nor a toll-road to establish a stage line and carry the mails,³ nor a company for manufacturing and selling railroad carriages to obtain a charter and build a railroad in a foreign country,⁴ nor a railroad to do a banking business.⁵ A corporation chartered to dock and repair vessels cannot engage in the owning and navigating of ships.⁶ A corporation chartered to do an insurance business cannot engage in banking.⁷ A contract by a railroad company to guarantee the expenses of a musical festival is *ultra vires*. So is the same contract by a corporation chartered to manufacture and sell musical instruments.⁸ A corporation organized for the purpose of engaging in the "general freight and transfer business" is not bound by its contract of suretyship in a matter outside of its regular business.⁹ A corporation chartered for the purpose of manufacturing machinery cannot act as selling agent of another manufacturer's machinery.¹⁰

ILLUSTRATIONS.—A corporation was chartered to construct and operate a railroad between Savannah and Macon, and to organize and carry on a banking business. *Held*, to have no authority to enter into a partnership with a private individual to purchase and run a steamboat on the Chattahoochie River, forming no part of its route: *Central R. R. & Banking Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353. A company was incorporated "for the purpose of establishing and conducting a line or lines of steamboats, vessels, and stages, or other carriages between P. and B., for the conveyance of passengers and transportation of merchandise and other articles." *Held*, that a contract of such company for the breaking of ice and towing

¹ *Lyde v. R. R. Co.*, 36 Beav. 14.

² *In re Phoenix Life Ins. Co.*, 2 Johns. & H. 441.

³ *Downing v. R. R. Co.*, 40 N. H. 230.

⁴ *Riche v. R. R. Co.*, L. R. 9 Ex. 224.

⁵ *People v. R. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64.

⁶ *New Orleans Steam Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90.

⁷ *Blair v. Perpetual Ins. Co.*, 10 Mo.

559; 47 Am. Dec. 129; *Ohio etc. Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. 1; 53 Am. Dec. 742.

⁸ *Davis v. R. R. Co.*, 131 Mass. 221; 41 Am. Rep. 236.

⁹ *Lucas v. White Line Transfer Co.*, 70 Iowa, 541; 59 Am. Rep. 449.

¹⁰ *Westinghouse Machine Co. v. Wilkinson*, 79 Ala. 312.

vessels through the track thus broken, such vessels being bound for V., is invalid: *Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248. A private corporation was chartered by the name of the "State Grange of the Patrons of Husbandry of Alabama." Held, that it had no power to lend money; such power is excluded by the declaration that the corporation is not created for pecuniary profit: *Chambers v. Falkner*, 65 Ala. 448.

§ 399. Authority to Wind up Business.—A corporation cannot, except with the consent of the legislature, alienate its property, and relinquish the control and management of its affairs, so as to divest itself of all further responsibility.¹ Trading or manufacturing corporations have an implied authority, with the consent of a majority of the stockholders, to wind up the business, distribute the assets, and surrender the charter.²

¹ York etc. R. R. Co. v. Winans, 17 How. 30; see *post*, Dissolution of Corporations.

² Wilson v. Central Bridge Co., 9 R. I. 590; Wood v. R. R. Co., 8 Phila. 94; Black v. R. R. Co., 22 N. J. Eq. 404; Lauman v. R. R. Co., 30 Pa. St. 42; 72 Am. Dec. 685. In *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490, it is said: "We entertain no doubt of the right of a corporation established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations acting by a majority of their stockholders to sell their property is absolute, and is not limited as to objects, circumstances, or quantity: Angell and Ames on Corporations, secs. 127 et seq.; 2 Kent's Com., 6th ed., 280; Mayor etc. of Colchester v. Lowton, 1 Ves. & B. 226, 240, 244; Binney's Case, 2 Bland, 142. To this general rule there are many exceptions arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects quasi public, such as railway, canal, and turnpike corporations, to which

the right of eminent domain, and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may perhaps be restrained from alienating their property, and compelled to appropriate it to specific uses by *mandamus* or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on the business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be

§ 400. No Implied Power to Enter into Partnership.—

Nor has a corporation any implied authority to enter into a partnership.¹ But it may make joint contracts by which both parties may become liable.² A corporation may be a joint owner of a ferry, and be entitled to an accounting.³ A corporation established to manufacture iron may be a partner with an individual in carrying on that business.⁴

§ 401. Nor to Deal in Shares of Other Corporations.—

Nor has a corporation any implied authority to deal in shares in another company.⁵ Though a railroad corporation may take the stock of another railroad corporation by way of security for a debt, it has no right to invest its

prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority."

¹ *Marine Bank v. Ogden*, 29 Ill. 248; *New York etc. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Whittenton Mills v. Upton*, 10 Gray, 582; 71 Am. Dec. 681; *Morris etc. Coal Co. v. Barclay*, 68 Pa. St. 173.

² *Marine Bank v. Ogden*, 29 Ill. 248.

³ *Hackett v. R. R. Co.*, 12 Or. 124; 53 Am. Rep. 327.

⁴ *Catskill Bank v. Gray*, 14 Barb. 471.

⁵ *Sumner v. Marcy*, 3 Wood. & M. 105; *Mechanics' Bank v. Meriden Agency*, 24 Conn. 159; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. R. R. Co.*, 43 Ga. 13; *Berry v. Yates*, 24 Barb. 199; *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Coppin v. Greenless Co.*, 38 Ohio St. 275; 43 Am. Rep. 425. In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594, the court say: "There would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the

capital stock of another corporation, unless authority to become such is clearly conferred by statute: *Mutual Savings Bank etc. v. Meriden Agency*, 24 Conn. 159; *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Sumner v. Marcy*, 3 Wood. & M. 105. Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock. Nor would this result follow any the less certainly if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is as to the corporation a stockholder, and has the right to vote upon the stock: *State ex rel. White v. Ferris*, 42 Conn. 563; *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525; *In re Barker*, 6 Wend. 509; *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291; *Field on Corporations*, sec. 69."

corporate funds in the purchase of such stock. Such an investment is *ultra vires*.¹

§ 402. **Nor to Alter Amount of Capital Stock or Purchase its Own Shares.**—A corporation has no implied authority to increase or diminish the number or value of its shares.² The power to increase its capital stock cannot be exercised by the directors, unless they are specially authorized so to do, either by the charter or by the stockholders.³ Where a corporation has power to increase its stock, those holding stock in the first instance are entitled to subscribe for the new stock according to their respective shares, and may sue the corporation for refusing them this right.⁴ A majority of the stockholders of a corporation cannot, without the consent of the minority, dispose of new stock without regard to its actual value.⁵ A corporation cannot, by by-laws or otherwise, deprive an unconsenting stockholder of a right secured to him by the corporate articles. Thus a building association cannot retire and cancel shares of stock against the will of the holder thereof.⁶ Therefore it cannot, without express authority, buy shares of its own stock, as this would increase the value of each remaining share;⁷ but it may acquire its own shares by bequest,⁸ or in satisfaction of debts due it.⁹ A corporation may purchase its own stock, there being no element of fraud in the transaction, and the corporation neither being insolvent nor contemplating dissolution.¹⁰

¹ *Milbank v. R. R. Co.*, 64 How. Pr. 20.

² *R. R. Co. v. Allerton*, 18 Wall. 235; *Knowlton v. Congress etc. Co.*, 14 Blatchf. 364; *Yew York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Sutherland v. Olcott*, 95 N. Y. 93.

³ *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90.

⁴ *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156.

⁵ *Jones v. Morrison*, 31 Minn. 140.

⁶ *Bergman v. St. Paul Mutual Building Ass'n*, 29 Minn. 275.

⁷ *German Savings Bank v. Wulfe-kuhler*, 19 Kan. 60; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *contra*, *Iowa Lumber Co. v. Foster*, 49 Iowa, 25; 31 Am. Rep. 140.

⁸ *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19.

⁹ *Taylor v. Ex. Co.*, 6 Ohio, 177; *State Bank v. Fox*, 3 Blatchf. 431; *Barton v. Plank Road Co.*, 17 Barb. 397; *Cooper v. Frederick*, 9 Ala. 738.

¹⁰ *Fraser v. Ritchie*, 8 Ill. App. 554.

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ILLUSTRATIONS. — The constitution and laws of Louisiana provide for the increase of corporate stock, but not for its decrease. *Held*, that a corporation is without power to make a decrease: *Seignouret v. Home Ins. Co.*, 24 Fed. Rep. 332. Unissued stock of a corporation was, by agreement of all the stockholders (there being no creditors), paid for with corporate funds, and issued to one stockholder to be held in trust for all. *Held*, that the issue was valid, and that the directors had no authority afterwards to direct the stock to be sold: *Jones v. Morrison*, 31 Minn. 140. The charter of a corporation provided for sixty days' notice of authorization of any increase of the capital stock, within which time any stockholder might have the privilege of taking additional shares. *Held*, that any stockholder not applying and tendering payment within such time would forfeit the privilege: *Hart v. St. Charles Street R. R. Co.*, 30 La. Ann., pt. 1, 758. Increasing the capital stock of a corporation, and issuing new shares to be sold at less than par to supply a fund actually needed by the corporation, *held*, not a "fictitious increase of the stock," within the California constitution avoiding such increases: *Stein v. Howard*, 35 Cal. 616. By the charter of an insurance company, its capital stock was fixed at a certain sum, with authority to increase it at the discretion of the stockholders. *Held*, that no formal vote of the stockholders was necessary to make the increase. The requisite assent of the stockholders could be shown by their conduct and acquiescence: *Payson v. Stæver*, 2 Dill. 428. The A. Life Association bought the greater part of the capital stock in the L. Life Ins. Co., paying with drafts. The directors of the A. were then elected directors of the L., and the larger part of the shares purchased were presented for redemption and redeemed, the consideration being the return of the largest draft, and by other transactions all the other drafts given by the A. for the stock were returned to it. *Held*, that these acts which resulted in the cancellation and retirement of the capital stock of the L. were constructively fraudulent: *Alexander v. Relpe*, 74 Mo. 495.

§ 403. **Nor to Give Away Property.**—There is no implied authority in a corporation or any of its agents to transfer or give away any of its funds or property gratuitously.¹ Thus it has no authority to sign accommodation paper for others, or to lend its credit, or give a guaranty without consideration.² A corporation may

¹ Morawetz on Corporations, sec. 232.

² *Lafayette Bank v. St. Louis Stone-ware Co.*, 2 Mo. App. 299; *Morford v.*

dispose of its stock for less than its face value, and the transaction, as between the corporation and the purchaser, will be valid unless prohibited by statute.¹

§ 404. The Corporation Name.—A corporation should use the name which its charter gives it,² though it may acquire a different name by usage.³ A change in the name of a corporation can only be affected by changing the articles of incorporation, and the best evidence of this change is the articles themselves.⁴ A court of equity may, upon objection made to the organization of a corporation by a specific name, on the ground that another corporation has already adopted the proposed name, or one so near like it as to lead to confusion, require a sufficient modification of the name to obviate objection.⁵ An injunction may be granted by analogy to the law of trademarks to a corporation, to restrain persons from adopting and using the same corporate name with that previously adopted regularly, and in good faith by complainant. A contract is not avoided by the misnaming therein of the corporation with which it is made.⁷ A misnomer in a grant by statute, or by devise to a corporation, does not avoid the grant, though the right name of the corporation be not used, provided the corporation really intended be made apparent.⁸ "The Enterprise Manufacturing Co.," when the charter name was "Enterprise Manufacturing

Farmers' Bank, 26 Barb. 568; Savage Mfg. Co. v. Worthington, 1 Gill, 284; Monument Nat. Bank v. Globe Works, 101 Mass. 57; 3 Am. Rep. 322. But see Taunton v. Royal Ins. Co., 2 Hem. & M. 135.

¹ Harrison v. R. R. Co., 4 McCrary, 264.

² Glass v. Turnpike Co., 32 Ala. 376.

³ Minot v. Curtis, 7 Mass. 441; Melledge v. Boston Iron Co., 5 Cush. 158; 51 Am. Dec. 59; Smith v. Plank Road Co., 30 Ala. 650; South District v. Blakeslee, 13 Conn. 227; Brown v. Parker, 7 Allen, 338; Williams v. Rob-

bins, 16 Gray, 77; 77 Am. Dec. 396; Fuller v. Hooper, 3 Gray, 341.

⁴ Chicago etc. R. R. Co. v. Keisel, 43 Iowa, 39.

⁵ Ex parte Walker, 1 Tenn. Ch. 97.

⁶ Newly v. R. R. Co., Deady, 609; Holmes v. Holmes etc. Mfg. Co., 37 Conn. 278; 9 Am. Rep. 324. So by statute in some states a certificate of incorporation will not be granted for a name the same as, or an imitation of, a prior one: State v. McGrath, 92 Mo. 355.

⁷ Hoboken etc. Ass. v. Martin, 13 N. J. Eq. 427.

⁸ Vansant v. Roberts, 3 Md. 119.

Co.," is not a material variance.¹ Where a corporation has been sued by a wrong name, the mistake may be corrected by an amendment of the writ.² Mere change of a corporation's name by the legislature does not affect third persons, as long as its identity appears.³ A subscription to the capital stock of a corporation is not invalidated by a legislative change in the name, and may be recovered in a suit under the new name.⁴ Although the name of a corporation has been changed by an act of the legislature, if the corporation continues to conduct its business in its original name, and otherwise exclusively uses that name after the passage of the act, it may by usage regain such original name, and can be lawfully sued and proceeded against in bankruptcy by that name.⁵

ILLUSTRATIONS. — A statute forbade a corporation to take the name of a person or firm without adding the word "company" or "corporation," together with some word designating the business. *Held*, that "Mallineckrodt Chemical Works" was not objectionable, although "Mallineckrodt" is a family name: *State v. McGrath*, 75 Mo. 424. Pending a suit by a corporation, an act of the legislature was passed changing the name of the corporation, if the incorporators should consent, and the suit proceeded to judgment in the original name. *Held*, that it was too late after judgment for the defendant to set up that there was no such corporation, especially if he fails to make it appear that the incorporators accepted the new name: *Water Lot Company v. Bank of Brunswick*, 53 Ga. 30.

§ 405. Corporation Seal—Not now Always Essential.

—A corporation contracts by the hands of its agents. Formerly the assent of the corporation could only be shown by the use of its corporate seal, but it is now

¹ *Jackson v. State*, 76 Ga. 552.

² *Burnham v. Savings Bank*, 5 N. H. 573; *Sherman v. Connecticut River Bridge Co.*, 11 Mass. 338; *Bullard v. Nantucket Bank*, 5 Mass. 99; *Georgetown v. Beatty*, 1 Cranch C. C. 234; *Lane v. R. R. Co.*, 5 Jones, 25. The statute authorizing suit to be brought against a company by its name is in derogation of the common

law, and will be strictly construed. A misnomer is fatal: *King v. Randlett*, 33 Cal. 318.

³ *Rosenthal v. Madison P. R. Co.*, 10 Ind. 359.

⁴ *Bucksport etc. R. R. Co. v. Buck*, 68 Me. 81.

⁵ *Alexander v. Berney*, 28 N. J. Eq. 90.

well settled, in this country at least, that this is not essential, and that a corporation may make a valid contract without the use of a seal.¹ A certificate of stock is valid without a seal.² The corporate seal is not essential to the validity of a mortgage purporting to have been executed by a private business corporation through its proper officers.³ A corporation may use any seal it pleases, but the seal used must be shown to have been adopted by the corporation, and to have been affixed by the proper officers.⁴ It seems that a corporation may adopt and make effectual as its seal the individual seals of its officers affixed to its deed, when it has no seal of its own.⁵ The seal of a corporation must be proved.⁶ Proof of the corporation seal is not necessary, where it is affixed by the proper officer of the company.⁷ The use of a corporate seal will be presumed to be a lawful use.⁸ The corporate seal attached to a contract is *prima facie* evidence that it was duly entered into by the corporation.⁹ The secretary of a corporation is the proper custodian of the corporate seal; and when the secretary affixes it to a mortgage or other instrument, the presumption is, he did it by the direction of the corporation, and it devolves upon those who dispute the validity of the deed to prove that he acted without authority.¹⁰ The usual practice is

¹ Morawetz on Corporations, secs. 167-170; Mott v. Hicks, 1 Cow. 513; 13 Am. Dec. 551; Angell and Ames on Corporations, sec. 257; The Banks v. Poitiaux, 3 Rand. 136; 15 Am. Dec. 706; Barker v. Ins. Co., 3 Wend. 94; 20 Am. Dec. 664; Garrison v. Combs, 7 J. J. Marsh. 84; 22 Am. Dec. 121; Am. Ins. Co. v. Oakley, 9 Paige, 496; 38 Am. Dec. 561; Ross v. City, 1 Ind. 281; 48 Am. Dec. 361; Chestnut Hill Turnpike v. Rutter, 4 Serg. & R. 6; 8 Am. Dec. 675; School District in Rumford v. Wood, 13 Mass. 199; Bank of United States v. Dandridge, 12 Wheat. 64; Bank of Columbia v. Patterson, 7 Cranch, 299; Union Bank v. Ridgely, 1 Har. & G. 324; Fleckner v. Bank of United States, 8 Wheat. 538;

Danforth v. Schoharie Turnpike Co., 12 Johns. 227.

² Fitzhugh v. Bank, 3 T. B. Mon. 126; 16 Am. Dec. 90.

³ Leinkauf v. Calman, N. Y., 1888.

⁴ Perry v. Price, 1 Mo. 664; 14 Am. Dec. 316.

⁵ Taylor v. Heggie, 83 N. C. 244.

⁶ Den v. Vreelandt, 7 N. J. L. 352; 11 Am. Dec. 551.

⁷ Susquehanna Bridge Co. v. General Ins. Co., 3 Md. 305; 56 Am. Dec. 740.

⁸ Indianapolis etc. R. R. Co. v. Morganstern, 103 Ill. 149.

⁹ Berks Road Co. v. Myers, 6 Serg. & R. 12; 9 Am. Dec. 403; Musser v. Johnson, 42 Mo. 74; 97 Am. Dec. 316.

¹⁰ Evans v. Lee, 11 Nev. 194.

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to prove the identity of a corporate seal by a witness acquainted with its impression.¹ The use of the seal gives no validity to a contract *ultra vires*.² A court of equity will not declare a contract between two corporations void merely because the seals of the corporation are not affixed to it; but if necessary, will rather compel the parties to affix their seals.³ A corporate seal otherwise sufficient, which is affixed to bonds by the printer, under direction of the corporate officers, who afterwards sign and issue the bonds, renders them valid as obligations under seal.⁴ The name of a corporation need not be signed to its sealed instruments, as a corporation executes its conveyances under its corporate seal, and the corporate name being subscribed would not give the instrument greater validity.⁵

¹ City Council v. Moorhead, 2 Rich. 430.

² Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592.

³ Missouri River etc. R. R. v. Com-missioners, 12 Kan. 482.

⁴ Royal Bank of Liverpool v. R. R. Co., 100 Mass. 444; 97 Am. Dec. 115.

⁵ Johnston v. Crawley, 25 Ga. 613; 71 Am. Dec. 174.

CHAPTER XXVI.

THE POWERS AND LIABILITIES OF OFFICERS AND AGENTS OF CORPORATIONS.

- § 406. Powers of agents of corporations generally.
- § 407. Liability of corporations for acts of promoters.
- § 408. The board of directors have all powers of the corporation.
- § 409. The board of directors cannot make radical changes.
- § 410. The board of directors cannot wind up corporation.
- § 411. Directors are trustees for corporation.
- § 412. The board of directors must not have conflicting interests.
- § 413. Liability of directors for fraud.
- § 414. Liability of directors for neglect.
- § 415. Liability of directors for mistakes made in good faith.
- § 416. Directors must act as board — Majority govern.
- § 417. Directors' meetings.
- § 418. Implied authority to appoint inferior agents and delegate authority.
- § 419. Powers of secretary and treasurer.
- § 420. President of corporation — Powers of.
- § 421. Removal of officers.
- § 422. Corporation bound by acts of agents within their authority.
- § 423. *Aliter* when outside authority.
- § 424. Acts of agent not in form required by statute not binding.
- § 425. Agent with general powers — Third person without notice of limitations of his power not bound — Presumption.
- § 426. Third persons presumed to know limitations in charter.
- § 427. But third persons not presumed to know limitations not in by-laws or regulations of company.
- § 428. Liability of corporations for fraudulent representations of agent.
- § 429. Unauthorized act of agent may be ratified by corporation.
- § 430. Unauthorized act of agent may be ratified by superior agent.
- § 431. Ratification inferred from conduct.
- § 432. Act beyond authority of agent cannot be ratified by majority of stockholders.
- § 433. Implied ratification by stockholders from conduct.
- § 434. What acts cannot be ratified.

§ 406. **Powers of Agents of Corporations Generally.** — So far as the powers and liabilities of agents of corporations are governed by the general principles of the law of agency, see the title "Principal and Agent," where the subject is discussed at length. In this and the succeeding sections

will be considered only the powers of the various agents of a corporation, as given or as limited by the charter or by general statutes relating to corporations. A corporation, unless expressly restrained by its charter, may contract through the agency of a select committee of its members.¹ When the common seal of a corporation is affixed to an instrument, and the signature of the proper officers are proved, courts presume that the officers did not exceed their authority.²

§ 407. Liability of Corporation for Acts of Promoters.

—A corporation is not responsible for the engagements of its promoters,³ but it may become liable by adopting and taking the benefit of their acts, and this adoption may be either express or implied.⁴ To make a corporation liable for services performed under a contract with the promoter of the corporation before its organization, the services must inure to its benefit, and have been rendered on its credit, not on that of individuals.⁵ Where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete that organization, and after it has been perfected the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for them, upon the ground that it must take the burden with the benefit.⁶

ILLUSTRATIONS. — An action was brought against a railroad company to recover the value of services performed before the

¹ Berks and Dauphin Co. v. Myers, 6 Serg. & R. 13; 9 Am. Dec. 402.

² St. Louis Public Schools v. Risley, 28 Mo. 415; 75 Am. Dec. 131.

³ Rockford etc. R. R. Co. v. Sage, 65 Ill. 323; 16 Am. Rep. 587; Safety Deposit Life Co. v. Smith, 65 Ill. 309; Western Screw Co. v. Cousley, 72 Ill. 531; Franklin Fire Ins. Co. v. Hart, 31 Md. 59; New York etc. R. R. Co. v. Ketchum, 27 Conn. 170; Marchand

v. Loan etc. Co., 26 La. Ann. 389; Frost v. Belmont, 6 Allen, 152; White v. Mfg. Co., 1 Pick. 215; 11 Am. Dec. 168; Munson v. R. R. Co., 103 N. Y. 58.

⁴ Bells Gap R. R. Co. v. Christy, 79 Pa. St. 54; 21 Am. Rep. 39; Frankfort Co. v. Churchill, 6 T. B. Mon. 427; 17 Am. Dec. 159.

⁵ Perry v. R. R. Co., 44 Ark. 383.

⁶ Low v. R. R. Co., 45 N. H. 370.

incorporation, in procuring the charter, making surveys, etc. *Held*, that plaintiff could not recover, in the absence of proof that a majority of the corporators or promoters of the corporation authorized the service: *Bells Gap R. R. Co. v. Christy*, 79 Pa. St. 54; 21 Am. Rep. 39. An agreement among parties owning a mine, and who expected to incorporate themselves, but did not then do so, that a person was entitled to two thousand five hundred shares of the stock of the company, *held*, not to be the agreement of the corporation: *Morrison v. Gold Mountain Co.*, 52 Cal. 307. Certain persons about to organize a corporation agreed to pay B. a royalty on articles to be manufactured under a patent he had applied for, and after the organization he obtained the patent. *Held*, that the corporation's payment of the royalty for a while was a ratification of the contract, and rendered it liable to account to B.: *Bommer v. American Spiral etc. Hinge Mfg. Co.*, 81 N. Y. 480. By an agreement among the promoters, before organization, of a hotel corporation, its principal subscriber turned over to it, at its organization, furniture equal in value to the amount of his subscription, and to release it from prior encumbrances took its notes therefor, secured by chattel mortgage thereof. *Held*, that these were valid obligations: *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

§ 408. The Board of Directors—Have All Powers of Corporation.—The board of directors of a corporation have implied authority to do every thing in the management of the business of the company that the corporation can itself do. They have, in short, all the powers of the corporation delegated to them. This arises from the fact that it cannot be expected that the whole body of the corporators, or even a majority of them, will or can take an active part at all times in the management of the business of the corporation, and therefore the corporation must act by some authorized hand, and this authorized hand is usually denominated the board of directors.¹ The power to have a board of directors is inherent in all private corporations. No special power need be conferred by statute.²

¹ *Burrill v. Nahant Bank*, 2 Met. 159; *Salem Bank v. Gloucester Bank*, 163; 35 Am. Dec. 396; *Hoyle v. R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *Bank v. Rutland etc. R. R. Co.*, 30 Vt. 17 Mass. 29; 9 Am. Dec. 111. ² *Hurlbut v. Marshall*, 62 Wis. 590.

Unless required by charter or statute, a director need not be a stockholder.¹ Where the charter provided that stockholders only should be elected directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them, are not eligible; and such fraud on the charter will prevent those participating in it from receiving any protection under its provisions to escape private responsibility.²

The directors have power to authorize the president and cashier to borrow money.³ The action of a board of directors *de facto*, which has been ratified by the subsequent action of the corporation, is valid, although after their election, but before the action was taken, another board of directors had been chosen, no evidence being offered that the second board ever accepted their trust.⁴ Directors of a corporation formed under a general law are chargeable with knowledge of the provisions of the law regulating their duties, or imposing liabilities upon them.⁵

But the corporation is not bound unless the directors act in the manner required by the charter.⁶ The proceedings of a board of *de facto* directors of a private corporation are presumed regular until irregularity is shown; therefore, when acting under a by-law, they remove an officer, it will be presumed that they acted on sufficient grounds, until their action is impeached by proof.⁷ Authority given to a board of directors to alter or amend the by-laws does not authorize them to alter or annul a by-law imposing a limitation on their powers.⁸ And

¹ Wight v. R. R. Co., 117 Mass. 226; 19 Am. Rep. 412.

² Bartholomew v. Bentley, 1 Ohio St. 37.

³ Ridgway v. Bank, 12 Serg. & R. 256; 14 Am. Dec. 681.

⁴ Penobscot etc. R. R. Co. v. Dunn, 39 Me. 587.

⁵ Van Etten v. Eaton, 19 Mich. 187.

⁶ Beatty v. Ins. Co., 2 Johns. 109; 3 Am. Dec. 401.

⁷ State v. Kupferle, 44 Mo. 154; 100 Am. Dec. 265.

⁸ Stevens v. Davison, 18 Gratt. 819; 98 Am. Dec. 692.

when the directors have been selected by the stockholders, the powers given to them cannot be interfered with by a majority of the stockholders.¹ The by-laws of a corporation giving to the directors "a general superintendence and control over the affairs of the corporation," with power to sell lands and tenements on such terms as they may deem advantageous, gives the directors no authority to delegate to an attorney power to lease lands.² The power to fill vacancies in a corporation and elect officers is a corporate incident, but this power does not attach to the board of officers to fill vacancies in their own board.³

ILLUSTRATIONS.—A stockholder's resolution that "it is not deemed necessary to adopt by-laws, for the reason that the articles of incorporation provide that the control and management of the corporation shall be in the hands of the board of directors." *Held*, to leave the entire control of the corporate business with the directory: *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439. A statute authorized a railroad company to take for a passenger station land occupied by another railroad. The by-laws of the company provided that the directors might purchase all real estate they deemed needful for the railroad, and exercise all powers granted to the company by their charter for the purpose of locating, constructing, and completing the railroad, and all other powers necessary and proper to carry out the objects of the company and the purposes of their charter. *Held*, that an acceptance of the statute by the stockholders was not necessary to authorize the directors to take the land: *Eastern R. R. Co. v. R. R. Co.*, 111 Mass. 125; 15 Am. Rep. 13. The by-laws of a corporation provided that the directors should have, in the management of the affairs of the corporation, all the powers which the corporation itself possessed, not incompatible with the provisions of the by-laws and the laws of the commonwealth. *Held*, that the directors might mortgage the lands of the corporation in security for its bonds, where the by-laws permitted: *Hendee v. Pinkerton*, 14 Allen, 381. A provision in a bank charter required a certain portion of the directors to be practical mechanics. *Held*, not to require that they should be in actual practice at the time of election: *Gray v. Mechanics' Bank of Alexandria*, 2 Cranch C. C. 51.

¹ *Conro v. Port Henry Iron Co.*, 12 Barb. 27.

² *Gillis v. Bailey*, 21 N. H. 149.

³ *Kearney v. Andrews*, 10 N. J. Eq. 70.

§ 409. Exceptions—Cannot Make Radical Changes.—

But the authority of directors "extends merely to the supervision and management of the company's ordinary or regular business. A board of directors have no implied authority to make a material and permanent alteration of the business or constitution of a corporation, even though the alteration be within the company's chartered powers."¹ No fundamental change in the charter of a corporation, which vitally and radically affects fixed and established rights, can be forced by the acts of the majority upon an unwilling stockholder.² The directors of an incorporated company, to whom the management of the concern is given generally, have no authority to apply to the legislature to increase their powers; and an act of the legislature, passed on such application without authority from the company, giving power to the company to raise an additional assessment on the stockholders, is void.³ Directors of a corporation, unless specially empowered, have no authority to make sale of any portion of its estate essentially necessary for the transaction of its customary business.⁴ A majority of the board of directors of a passenger railway company, though controlling a majority of the stock, have no power, without special authority in their charter, to execute a lease of the road and property without first submitting the question to the stockholders at a meeting called in accordance with their charter.⁵ Where the charter of a corporation says that the capital stock of the corporation shall be a sum named, "and may be increased from time to time at the pleasure of the said corporation," the directors alone, and without the matter being submitted to and approved by the stockholders, have no power to increase it, unless

¹ Morawetz on Corporations, sec. 239; *Railway Co. v. Allerton*, 18 Wall. 233; *New York etc. R. R. Co. v. Schuyler*, 38 Barb. 534.

² *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

⁴ *Rollins v. Clay*, 33 Me. 132.

⁵ *Martin v. R. R. Co.*, 14 Phila.

³ *Hoey v. Henderson*, 32 La. Ann. 10. 1069.

expressly authorized thereto. The fact that the charter declares that "all the corporate powers of the said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint," does not alter the case. The powers thus granted to the directors refer to the ordinary business transactions of the corporation.¹

ILLUSTRATIONS.—The charter of a corporation provided that its capital stock should be one hundred thousand dollars, with the power to increase it to five hundred thousand dollars, but did not provide by whom this power should be exercised. *Held*, that the board of directors could not increase the capital stock without the assent of the stockholders: *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90. A board of directors of a mining corporation makes a nominal lease of the mine owned by the corporation, to a party really acting in the interests of a minority of the stockholders, not in the ordinary course of the business of the corporation, but for the purpose of withdrawing the mine from the control of a board of directors about to be elected at an approaching meeting of the stockholders, and thereby perpetuating the control of the minority. *Held*, that a court of equity will cancel the lease on a bill filed by the corporation for that purpose: *Mahoney Mining Co. v. Bennett*, 5 Saw. 141. The powers and privileges of the Norfolk Manufacturing Company were, by its charter, made subject to the provisions of an act vesting the levying of assessments exclusively in the corporation. A by-law was passed, authorizing the directors "to take care of the interests and manage the concerns of the corporation." *Held*, that the corporation had no power to delegate an authority to the directors to lay assessments, and that the by-law did not, in fact, import an intention to delegate it: *Ex parte Henry Winsor*, 3 Story, 411.

§ 410. **Cannot Wind up Corporation.**—Nor have the directors implied authority to wind up the company, or to sell property necessary to carry on its business,² or to give away its funds, or deprive it of any of the means to accomplish the purpose for which it was chartered.³ A

¹ *Railway Co. v. Allerton*, 18 Wall. Rubber Co., 33 Barb. 578; *Rollins v. Clay*, 33 Me. 132.

² *Bank Commissioners v. Brest*, 1 Harr. Ch. 106; *Abbot v. American*

³ *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29.

corporation's assignment for benefit of creditors, made by the board of directors, without consent of the stockholders, is void as against the stockholders, but not as against a mere creditor.¹

§ 411. **Directors Trustees for Corporation.**—The directors of a corporation stand in a fiduciary relation to the stockholders, and are generally recognized as trustees. Hence, they are held to the utmost good faith in their dealings for and with the corporation.² A director of a corporation occupies a trust relation towards the stockholders, which disables him from taking any personal benefit under a contract entered into by the board, on behalf of the corporation. Thus a railroad director cannot be individually interested in a contract for the construction of the road.³ So where a director, by means of his power as such, secures to himself any advantage over other stockholders or creditors, equity will treat the transaction as void, or charge him, as trustee, for the benefit of the injured parties; nor can such director, as to such

¹ *Epwright v. Nickerson*, 78 Mo. 482.

² *Keohler v. Black River Iron Co.*, 2 Black, 715; *European etc. R. R. Co. v. Poor*, 59 Me. 277; *Butts v. Wood*, 38 Barb. 188; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5; *Kimmell v. Geeting*, 2 Grant Cas. 125; *Redmund v. Dickerson*, 9 N. J. Eq. 507; 59 Am. Dec. 418; *Blair Town Lot Co. v. Walker*, 50 Iowa, 376; *Little Rock R. R. Co. v. Page*, 35 Ark. 304; *Chouteau v. Allen*, 70 Mo. 290; *Hoffman etc. Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; 77 Am. Dec. 311; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Hoyle v. R. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595, the court saying: "Vilas was a director of the railroad company during the whole period of the transactions in question. He and his co-directors were together clothed with the power of managing the corporate property and conducting the affairs of

the corporation. From this position arose the duty of managing and conducting its affairs to the best advantage, and the obligation not to let the private interests of any individual director compete with his duty toward the corporation. Whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests. He falls, therefore, within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involved in such confidence."

³ *European etc. R. R. Co. v. Poor*, 59 Me. 277.

parties, claim to have acted in ignorance of what it was his duty to know concerning the conduct and condition of the affairs of the corporation.¹ Equity will not permit a director in the exercise of his official duties to make a profit for himself, to the exclusion of the other stockholders.² A resolution of the board of trustees, carried by the casting vote of the president, ratifying an unauthorized act of the president, in a matter in which he was personally interested, is void.³ When a director assents to a contract from which he is to derive a secret profit, equity will compel him to surrender it to the company.⁴ A director cannot enforce a contract made with his co-directors, under which he is to have one third of a profit of one hundred thousand dollars for selling a railroad property, his services being trifling. Such a contract is beyond the power of the directors to make.⁵ A director cannot use the funds of the corporation in payment of a note made by them to the president of the corporation as payee, and for its benefit.⁶ So directors who sell to themselves stock at one third of its par value are liable to the company and its creditors for the full value of the stock.⁷ A director cannot speculate with the funds of the corporation, and appropriate the profit. Nor can he in making sales and purchases take advantage of his position for his own profit.⁸ A sale by directors of its assets to another corporation in which the same persons are interested as stockholders, for an inadequate price, should be set aside as against any stockholders in the former company who have not consented to it. Such a sale is in effect a sale by a trustee to himself. The vendor and purchaser are in the same interest. It is the duty of the managing

¹ *Corbett v. Woodward*, 5 Saw. 403.

² *Farmers' etc. Bank v. Downey*, 53 Cal. 466; 31 Am. Rep. 62.

³ *Chamberlain v. Pacific Wool-growing Co.*, 54 Cal. 103.

⁴ *Bent v. Priest*, 10 Mo. App. 543.

⁵ *Hubbard v. New York etc. Investment Co.*, 14 Fed. Rep. 675.

⁶ *Gallery v. Albion Exchange Bank*, 41 Mich. 169.

⁷ *Freeman v. Stine*, 15 Phila. 37.

⁸ *Redmond v. Dickerson*, 9 N. J. Eq. 507; 59 Am. Dec. 418.

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directors of the vendor company, as such, to obtain the highest price for the property; while, as stockholders in the purchasing company, it is their interest to buy it as low as possible.¹ A director who, by agreement with his co-directors, sells the bonds of the corporation on his private account, must account for the profit realized to creditors or stockholders.² The stockholders and creditors of a canal company may compel a railroad to account for the additional value of property of the canal company appropriated by the railroad company for railroad purposes, with the assent of the board of directors of the canal company elected in the interest of the railroad company, the compensation therefor being agreed upon by the directors of the two companies, and being far below the value of the property, although they cannot, after the railroad has been completed, reclaim the property or enjoin its use.³ The executive committee of a company have no right to vote money to themselves in addition to their regular compensation, for their services as promoters and originators of the company, or in consideration of the members retiring from the executive committee. And if large sums are granted for those purposes, this affords a good reason for the appointment of a receiver.⁴ A creditor of a corporation may pursue its property into the hands of a director, a share-holder, to whose use were appropriated bonds, assets of the corporation, under a resolution in the passage of which he aided, he being liable to the creditors as trustee for the value of such bonds.⁵ A creditor holding property of a corporation, in order to apply the profits thereof to reimburse himself and pay its other debts, is analogous to a trustee, and must return to the stockholders the remnant of the prop-

¹ Goodin v. Canal Co., 18 Ohio St. 169; 98 Am. Dec. 95.

² Widrig v. R. R. Co., 82 Ky. 511.

³ Goodin v. Canal Co., 18 Ohio St. 169; 98 Am. Dec. 96.

⁴ Blatchford v. Ross, 54 Barb. 42; 5 Abb. Pr., N. S., 434; 37 How. Pr. 110.

⁵ Union Bank v. Douglass, 1 McCrary, 86.

erty in his hands after the purposes of the *quasi* trust have been subserved.¹ Directors are *quasi* trustees, and without special power under the charter cannot bind the corporation or its assets by a contract to pay usury.² A promissory note made by a corporation to its trustees is void as against public policy.³ The officers and directors of a railroad corporation are not technical trustees, and have a perfect right to buy up the shares of stockholders at less than the par value, and sell them at a profit to another corporation, which thereby acquires a majority of the stock, and so the control of the railroad.⁴ A director may become its creditor, and foreclose a mortgage and purchase at the execution sale, but he is bound to act in the utmost good faith, and the sale will be set aside on slighter grounds than in ordinary cases.⁵ The doctrine that the directors are trustees for the stockholders has relation only to the acts of the directors in connection with the property held by the corporation itself, and to their management of its business. And a director in purchasing his stock is not bound to communicate to the stockholder his knowledge of its worth, although the same was obtained by reason of his official relation to the company; nor is he bound, in order to make a valid purchase, to pay a fair and adequate price therefor.⁶ A director of a railroad company stands in a fiduciary relation to a stockholder, and in acting for him in his absence cannot be regarded as a stranger.⁷

ILLUSTRATIONS. — A majority of stockholders, authorized by law to dissolve the corporation and distribute its property, themselves having become the purchasers, are not under an unfair appraisal, *held*, accountable to the other stockholders for its

¹ *Pioneer Gold Mining Co. v. Baker*, 20 Fed. Rep. 4.

² *Planters' Warehouse Co. v. Johnson*, 62 Ga. 308.

³ *Wilbur v. Lynde*, 49 Cal. 290; 19 Am. Rep. 645.

⁴ *Deaderick v. Wilson*, 8 Baxt. 108.

⁵ *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178.

⁶ *Comm'rs of Tippecanoe County v. Reynolds*, 44 Ind. 509; 15 Am. Rep. 245.

⁷ *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329; 70 Am. Dec. 128.

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value: *Ervin v. Oregon R'y & Nav. Co.*, 20 Fed. Rep. 577. A director of a bank loaned the moneys of a bank on a note running to the bank at a stipulated rate of interest, but on a secret agreement with the borrowers that he should participate in the profits of lands to be purchased with the moneys. *Held*, that he was bound to surrender those acquired profits to the bank. *Farmers' etc. Bank v. Downey*, 53 Cal. 466; 31 Am. Rep. 62. The president of a company who was also director, having knowledge through his official position that the company's stock was worth more than its nominal market value, purchased stock of a stockholder for the market price, and without disclosing to him the facts within his knowledge, as to the real value. *Held*, that there was no relation of trust between the parties, and that in the absence of actual fraud the purchase was valid: *Commissioners v. Reynolds*, 44 Ind. 509; 15 Am. Rep. 245. One, in order to secure his pay as president and attorney of a private corporation, caused its secretary to assign to him certain certificates of purchase of land held by the corporation, and in their possession as officers thereof. *Held*, that a court of equity might compel an unconditional return of the certificates; the officers had no lien thereon: *Emporium etc. v. Emrie*, 54 Ill. 345. A bill was brought by the assignees of a foreign corporation against several citizens of Massachusetts, who had been directors of said corporation, alleging that they had not used the property and moneys of the corporation for lawful purposes, but had illegally misused and expended it, and divided some of the money among themselves for their own benefit. *Held*, that it was not demurrable: *Gindrat v. Dane*, 4 Cliff. 260. The trustees of a corporation resolved by vote to borrow money upon mortgage of the corporate property to pay corporation debts, and authorized A, the president, to execute a mortgage. A purchased the debts, and had them assigned to a firm of which he was a member, to which firm the mortgage was made. In an action to foreclose, *held*, that this transaction was not authorized by the resolution of the trustees, nor would the law permit the president thus to deal with himself: *Davis v. Rock Creek etc. Mining Co.*, 55 Cal. 359; 36 Am. Rep. 40. The trustee of a corporation contracted to purchase land for the corporation, to take the title in his own name, and to then convey to the corporation, the land having been paid for. *Held*, that he could be compelled to accept a deed and to convey: *Einsphar v. Wagner*, 12 Neb. 458. A sale to a stockholder of the corporate property ordered sold at a general meeting of the stockholders, not all the stockholders being present, there being no board of directors, *held*, voidable, though the purchaser paid a fair price: *Reilly v. Oglebay*, 25 W. Va. 36. B and C, as promoters of a projected corporation, negotiated an agreement

between it and A, a patent owner, by which B and C were to receive certain shares of the stock. B and C then offered the public an option to take stock, disclosing that a portion was to be issued to A in part payment, but not that B and C were to have stock on any different terms. B was elected president and C treasurer, and they placed a large amount at seven dollars a share, getting their own stock for nothing. *Held*, that their fiduciary relation was such that any secret profits must be refunded to the company; and that they were jointly liable therein as partners: *Chandler v. Bacon*, 30 Fed. Rep. 538. A lease was made by the board of directors on the day their terms of office expired, two of the board having been concerned in a fraudulent issue of spurious stock to two lessees in the employ of the corporation, one of whom had been an agent in the issue of such stock, and securing such lessees a clear profit equal to one half of the gross earnings of the road. *Held*, a fraud on the rights of the stockholders: *Stevens v. Davison*, 18 Gratt. 819; 98 Am. Dec. 692. A debt of a corporation beyond the limit prescribed by its charter was held by its directors, and they in good faith took a mortgage on the property of the corporation for security. *Held*, that they may enforce such security, even though they participated in the management of the corporate business in such a way as to permit the accumulation of the debt beyond the allowed limit, and though the corporation was insolvent when the mortgage was taken, and the mortgage gave them a preference over other creditors: *Garrett v. Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461.

§ 412. **Must not have Contrary Interests.**—Therefore a director cannot represent the company when he has adverse interests of his own in any transaction.¹ Acts of officers of a corporation, in any transaction in which both the corporation and they themselves individually are interested, do not bind the corporation.² A contract between a railroad and a construction company is void, when any

¹ *Hoyle v. R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *Cumberland Bank v. Sherman*, 30 Barb. 553; *Gilman etc. R. R. Co. v. Kelley*, 77 Ill. 426; *Goodin v. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 204; 100 Am. Dec. 628; *Covington R. R. Co. v. Bowler*, 9 Bush. 468; *Paine v. R. R. Co.*, 31 Ind. 283; *Cook v. Berlin Wool Co.*, 43 Wis. 443; *Stark Bank v. U. S. Pottery Co.*, 34

Vt. 144; *Wardell v. R. R. Co.*, 4 Dill. 330; 103 U. S. 751; *European etc. R. R. Co. v. Poor*, 59 Me. 277; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Stewart v. R. R. Co.*, 38 N. J. L. 505; *San Diego v. R. R. Co.*, 44 Cal. 106; *Gallery v. Bank*, 41 Mich. 169; 32 Am. Rep. 149.

² *Davenport Bank v. Gifford*, 27 Iowa, 575.

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of the directors of the railroad are members of the construction company, and the fact of long acquiescence on the part of the stockholders of the railroad makes no difference.¹ Directors of one telegraph company, who are also directors of another company, which owns two fifths of the stock of the former company, cannot vote to lease the former company to the latter.² A contract between a corporation and a director thereof, embodied in a resolution for the passage of which the director's vote was necessary and was given, is invalid.³ A contract between two corporations is not void because all the directors of one corporation are members of the board of directors of the other corporation.⁴ A purchase by a corporation will not be set aside because of the interest of one of the directors, where the complaining stockholder has suffered no damage.⁵ A party who constructs ditches under a written contract with the directors of a draining company may recover on the contract, although he was one of the directors at the time of its execution.⁶ In order to enable a manufacturing corporation to pay its debts, and thus continue its business, its directors may guarantee payment of its note made to its own order, and take as security for their liability its mortgage on all its property.⁷ While an arrangement by which a managing director of a railroad corporation puts forward a third person as a contractor to do work for the corporation, the director designing to secure a special benefit to himself may be constructively fraudulent, yet where the relation of the director to the contract is not that of an undisclosed principal, and the stockholders have knowledge of the facts and power to prevent the consummation of the

¹ Thomas v. R. R. Co., 1 McCrary, 392.

² Bill v. Western Union Tel. Co., 16 Fed. Rep. 14.

³ Bennett v. St. Louis Car Roofing Co., 19 Mo. App. 349.

⁴ Alexander v. Williams, 14 Mo. App. 13.

⁵ Hill v. Nisbet, 100 Ind. 341.

⁶ Ward v. Polk, 70 Ind. 309.

⁷ Hopson v. Aetna Axle and Spring Co., 50 Conn. 597.

contract, if they choose, actual fraud not existing, constructive fraud will not be presumed.¹

ILLUSTRATIONS. — The president of a railroad company, who was not a stockholder, loaned it \$81,000, to secure which its board of directors directed its treasurer to deliver to him, for it, 810 of its bonds, each for \$1000. In an action to foreclose a mortgage given to secure its bonds, *held*, that in absence of any showing of fraud or of insolvency of the company when he was entitled to take the bonds, he might prove them for their full amount, and share in the distribution up to the amount of his claim; and this though two other members of the board were guarantors: *Duncomb v. R. R. Co.*, 88 N. Y. 1.

§ 413. **Liability of Directors for Fraud.** — The directors are liable to the company for losses resulting from their frauds or willful acts.² For the damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors.³ So a court of equity, at the instance of the stockholders, may call the directors of a corporation to account for abuse of trust, waste, or misapplication of funds.⁴ Directors of a corporation placing bonds in the hands of an agent for sale, and falsely and knowingly causing them to be indorsed "first-mortgage bonds," are liable in damages to purchasers in good faith relying on such indorsement and injured by the misrepresentation.⁵ So if directors of a corporation knowingly issue spurious stock and obtain a loan on it, they are personally liable.⁶ A director of a corporation who sees a card issued by the officers of the company in the ordinary course of their business,

¹ *Union Pacific R. R. Co. v. Credit Mobilier*, 135 Mass. 367.

² *Percy v. Millaudon*, 3 La. 568; *United Society v. Underwood*, 9 Bush, 617; 15 Am. Rep. 731; *Verplauch v. Ins. Co.*, 1 Edw. Ch. 87; *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212; *Smith v. Rathbun*, 66 Barb. 405; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Smith v. Poor*, 40 Me. 415; 63 Am. Dec. 672.

One who has acted as trustee may be liable, although he was not legally elected, and was not a stockholder: *Halstead v. Dodge*, 51 N. Y. Sup. Ct. 169.

³ *Crook v. Jewett*, 12 How. Pr. 19.

⁴ *Bayless v. Orne*, 1 Freem. Ch. 161.

⁵ *Clark v. Edgar*, 12 Mo. App. 345; 84 Mo. 106; 54 Am. Rep. 84.

⁶ *Exchange Bank v. Sibley*, 71 Ga. 726.

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with the names of the directors attached, cannot be held liable for false representations contained in the card, where it appears that he did not circulate the cards, and had no knowledge as to the truth or untruth of the representations thereon, but allowed his name to be used without reflection as to the consequences.¹ A director of a manufacturing company, who has assented to a dividend amounting to more than the profits, may be sued for such violation of duty without joining with him the company as defendant.² False representations, made by the officers of a corporation which has become a stockholder in another corporation, as to the financial condition of the latter, do not subject the former to liability as a member of the latter for debts, etc.³ The directors of an insurance company are liable personally to the assured, who, by reason of the insolvency of the company, has been unable to recover upon his policy, where they have fraudulently made and published false representations as to the financial condition of the company whereby the plaintiff was induced to insure therein; and it is no defense that they were acting officially, or that there was no privity of contract between them and the plaintiff.⁴

ILLUSTRATIONS. — An insolvent corporation being indebted to its officers and directors, they executed the notes of the corporation in their own favor, and having obtained judgment by default, issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation, *held*, that this conduct of the officers was a fraud in law, which gave them no preference over general creditors in the distribution: *Hopkins's Appeal*, 90 Pa. St. 69. The defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company, and for the reinsurance of the same in the latter company. *Held*, that so many of the bonds as defendant received belonged to the corporation of

¹ *Wakeman v. Dalley*, 44 Barb. 498.

² *Hill v. Frazier*, 22 Pa. St. 320.

³ *Langan v. Iowa and Minnesota Constr. Co.*, 49 Iowa, 317.

⁴ *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255.

which he was a director, and on his failure to produce the same, a judgment for their estimated value was rightly entered: *Bent v. Priest*, 86 Mo. 475. A treasurer of a corporation presented his claim for pay for services to the board of directors, and it was allowed; all the proceedings were strictly regular, but it was shown that the quorum of directors present at the meeting consisted of the treasurer himself, his father, and another relative. The payment of such compensation to the treasurer was contrary to the distinct understanding of the parties. *Held*, that a suit against these three directors by one stockholder, in behalf also of the rest, would lie, and that a judgment setting aside the transaction as an abuse of trust, and for the repayment of the money, was correct: *Butts v. Wood*, 38 Barb. 181. A statute, providing for the making of a return by the officers of certain corporations, enacted that if the certificate of the state of the company were false in any material representation, the officers signing it should be personally liable, etc. A certificate set forth that the capital stock had been paid in in cash, whereas in fact it had been paid in in property of an uncertain value. *Held*, that this was a material misrepresentation, and the officers were liable: *Waters v. Quimby*, 27 N. J. L. 198. Certain partners, as directors in a corporation, voted to award a construction contract, which they knew was then going to be transferred, to their copartners, who were also directors. *Held*, that they could not enforce an agreement giving them a share in the transaction, as they were participants in the fraud: *Weed v. R. R. Co.*, 31 Minn. 154. A. bought property for eighty thousand dollars, and eight months afterwards conveyed it to a corporation for the nominal sum of seven hundred thousand dollars, taking all the capital stock of the corporation in payment. The directors swore to a certificate stating that the amount of capital stock paid in full was seven hundred thousand dollars. *Held*, that the directors were properly found to have sworn to a false certificate, and therefore to be personally liable to a creditor of the corporation: *Huntington v. Attrill*, 42 Hun, 459.

§ 414. Liability of Directors for Neglect.—They are likewise liable for losses caused by their carelessness or neglect in attending to the duties of their office.¹ It is no defense that they acted gratuitously and without compensation. The law requires that he who undertakes the responsibilities of the position of a director shall bring to the exercise of his trust a skill and knowledge com-

¹ *Springer's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684.

mensurate with the duties of that important position. A director is liable for ordinary neglect, and is bound to exercise reasonable diligence proportionate in every case to the undertaking.¹ When directors of a corporation have the means of knowledge, ignorance will not excuse them for allowing the funds thereof to be diverted from the purposes of the trust; and they are individually responsible therefor.² To charge a trustee of a manufacturing corporation within the statute for signing a false report, knowing it to be false, some fact or circumstance must be shown indicating that it was made in bad faith, or for some fraudulent purpose, and not ignorantly nor inadvertently; and this is a question of fact that must be passed upon before the liability can be adjudged. If the report filed be untrue, and constitutes a false representation, it renders liable only the trustee who signed it, and who signed knowing it to be false.³ A creditor of a corporation cannot maintain an action against the directors for damages, on the ground that their misconduct has caused the insolvency of the corporation.⁴ Directors are not necessarily bound to keep corporate property insured.⁵ Under a statute making the directors of a corporation liable to its creditors for losses occurring from their official mismanagement, they are personally responsible only for the official mismanagement which occurred during the year for which they were chosen, and during which they acted. One board of directors cannot be answerable for renewals of worthless paper, discounted by a previous board.⁶ Under a statute making the trustees of a manufacturing corporation liable for debts existing at the time of the neglect of the trustees to file the annual report required, a judgment existing at the time of such

¹ Bank v. Hill, 56 Me. 385; 96 Am. Dec. 471.

² Shea v. Mabry, 1 Lea, 319.

³ Pier v. Hanmore, 86 N. Y. 95; Pier v. George, 86 N. Y. 613.

⁴ Winter v. Baker, 34 How. Pr. 183.

⁵ Charlestown Boot and Shoe Co. v. Dunsmore, 60 N. H. 85.

⁶ Bank of Mutual Redemption v. Hill, 56 Me. 385; 96 Am. Dec. 470.

neglect is a "debt" within the meaning of the statute.¹ Under a statute making directors of a corporation liable for debts beyond the amount of its capital, debts to them are not to be counted.²

§ 415. Liability for Mistakes Made in Good Faith.—

Directors, like mandataries and other agents, are not responsible for an error in judgment when duty compels them to choose between difficulties, and the case is one in which doubt may reasonably be said to exist and it is hard to say which is the safe course. But when the error is gross, the necessity for the act not apparent, and the consequences fatal, they must be held responsible, or the principal be left without protection.³ Where certain per-

¹ *Lewis v. Armstrong*, 8 Abb. N. C. 385.

² *McClave v. Thompson*, 36 Hun, 365.

³ *Hodges v. New England Screw Co.*, R. I. 312; 53 Am. Dec. 624; *Scott v. Depeyster*, 1 Edw. Ch. 513. In *Spring's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, the law is well stated by Sharswood, J., as follows: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, — persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to be held

responsible for mistakes of judgment, or want of skill and knowledge? They have been requested by their co-stockholders to take their positions, and they have given their services without compensation. We are dealing now with their responsibility to stockholders, not to outside parties, — creditors and despositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentleman elected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept

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sons enter into a contract claiming to be directors of a corporation, if no such corporation really exists, such persons are individually liable on the contract.¹ The publication by savings bank directors, that directors and stockholders are personally responsible for its debts, does not constitute a contract with depositors, but if intentionally false, affords the basis of an action for deceit.²

ILLUSTRATIONS.—The officers of a public corporation in their official capacity made a contract under a mistake of law. The other party to the contract was equally mistaken as to the law. Each had the same opportunities of knowing the law. *Held*, that the officers were not personally liable, and that a like rule would apply to public bodies not incorporated: *Humphrey v. Jones*, 71 Mo. 62. The directors of an insurance company re-elected their secretary, but took no new bond, supposing that the bond first given was a continuing security. They took no legal advice, but were good business men, stockholders in the company, and acted in good faith. *Held*, that they could not be made personally liable for the secretary's defalcation: *Vance v. Phoenix Ins. Co.*, 4 Lea, 385. The president of an omnibus company directed its drivers to exclude all colored persons. *Held*, that he was individually liable for the ejection and personal injury of such persons, although an action might have been maintained against the company: *Peck v. Cooper*, 112 Ill. 192; 54 Am. Rep. 231.

§ 416. Directors must Act as Board—Majority Govern.—The directors must act as a board, and not singly. All must either be present or have been notified, and the vote of a majority binds all.³ A majority of the directors must be present to constitute a board competent to trans-

such places. . . . These citations, which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, or willful misconduct, or breach of trust for their own benefit, and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers, or co-directors, yet they are not liable for mistakes of judgment, even though they may be

so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body."

¹ *Herod v. Rodman*, 16 Ind. 241.

² *Westervelt v. Demarest*, 46 N. J. L. 37; 50 Am. Rep. 400.

³ *Morawetz on Corporations*, sec. 247; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Elliot v. Abbot*, 12 N. H. 549; 37 Am. Dec. 227; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516.

act business.¹ A contract by a board of directors cannot be changed by less than a quorum.² Where a quorum votes to make a contract with one of their number, the contract is not necessarily void because such member voted, no fraud or bad faith being charged.³ Where a quorum attend a meeting, it will be presumed that all were notified.⁴ If a quorum meet and unite in any action, the corporation is bound, although the other directors were not notified.⁵ An assessment on stock, authorized to be made by a board of managers, may, in the absence of a regulation as to the number necessary to constitute a quorum, be made by a majority of the board.⁶ An assignment for the benefit of creditors, made by a majority of the directors constituting a legal quorum, is not invalid because two of the directors, being out of the state at the time, failed to receive actual notice of the meeting.⁷

ILLUSTRATIONS. — The charter of a corporation empowered the president and directors to make by-laws. *Held*, that the power might be exercised by the president and a majority only of the directors: *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. (Mich.) 124; 43 Am. Dec. 457. An original charter granted by the state of Connecticut required four directors to constitute a quorum. The company was afterwards merged with a corporation chartered by Rhode Island, whose charter was silent as to the number required. By the contract of merger, which was affirmed by the Rhode Island legislature, the latter company surrendered its franchises, powers, and privileges to the Connecticut company; and the Connecticut legislature, by an act confirming the merger, declared that all the rights of the old company in this state should be preserved to the new one. *Held*, that after the merger, four only, and not a majority, were necessary for a quorum: *Lane v. Brainerd*, 30 Conn. 565. The charter of a railroad company provided that for non-payment of assessments, "the directors may order the treasurer to sell such

¹ *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525.

² *Tennessee etc. R. R. Co. v. R. R. Co.*, 73 Ala. 426.

³ *Leavitt v. Mining Co.*, 3 Utah, 265.

⁴ *Chouteau Ins. Co. v. Holmes*, 63 Mo. 601; 30 Am. Rep. 807.

⁵ *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Dec. 207.

⁶ *St. Louis Colonization Ass'n v. Hennessy*, 11 Mo. App. 555.

⁷ *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64.

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shares at auction, etc., and the delinquent subscriber shall be held accountable for the balance, if the shares sell for less than the assessments." The directors voted that the president and treasurer be a committee to collect arrearages, and enforce such collection by sales or otherwise. *Held*, that a sale under this vote was void; that the directors could not delegate the power of ordering sales to a committee, and that an order to the treasurer must be absolute, and not in the alternative: *York etc. R. R. Co. v. Ritchie*, 40 Me. 425.

§ 417. **Directors' Meetings.**—It is immaterial in what manner the stated meetings of directors have been fixed. It is enough if they are in fact regularly held on stated days.¹ Where the charter of such corporation does not restrict the directors as to the place of their meeting, they may meet in another state, and there appoint a secretary.² A trustee elected to fill a vacancy holds over until his successor is elected and qualified, if that is the rule as to ordinary trustees.³ Where the action of the directors at a special meeting is ratified at a subsequent special meeting, of which all the directors had legal notice, and at the next regular meeting "the minutes of the last two meetings were read and approved," it is immaterial whether all the directors were legally notified of such first special meeting, in the absence of fraud or conspiracy.⁴

ILLUSTRATIONS.—A mortgage was executed under a resolution passed at a special meeting of the directors. The resolution recited that written notices of the meeting had been served on each director. The purpose of the meeting was not specified in the notices. *Held*, that the meeting was regularly called, and the mortgage valid: *Granger v. Original Empire Mill etc. Co.*, 59 Cal. 678. The by-laws of a corporation fixed stated days for directors' meetings, and provided that when less than a quorum, but more than three, should be present, they might adjourn to any day prior to the next regular meeting. *Held*, that at a meeting so adjourned the acts of a majority of a quorum present were binding, though the absentees had no special no-

¹ *Atlantic Fire Ins. Co. v. Sanders*, 36 N. H. 252.

² *McCall v. Bryam Mfg. Co.*, 6 Conn. 423.

³ *Huguenot Nat. Bank v. Studwell*, 6 Daly, 13.

⁴ *County Court v. R. R. Co.*, 35 Fed. Rep. 161.

tice of the adjourned meeting: *Smith v. Law*, 21 N. Y. 296. A meeting of the directors of a bank in New Haven, called by the cashier, by direction of the president, who was then in New York, by personal notice to the directors in New Haven, without specifying in such notice the object of the meeting, held, to be a legal meeting for the transaction of ordinary business: *Savings Bank v. Davis*, 8 Conn. 191.

§ 418. Implied Authority to Appoint Inferior Agents, and Delegate Authority.—The directors have implied authority to employ inferior agents to attend to the affairs of the corporation.¹ But the general power of management cannot be delegated by the directors. "Hence," says Mr. Morawetz,² "it has been held that the board of directors of a colliery company cannot delegate the power of allotting shares to two members of the board and the manager;³ nor can the directors of a corporation delegate the power of making calls,⁴ or of declaring dividends,⁵ or of ordering a sale of shares for non-payment of assessments."⁶ The board of directors may appoint agents to receive subscriptions to its capital stock, and the subscriptions so received are binding.⁷ If a corporation furnishes its secretary with money to pay its employees, and an employee monthly delivers to the secretary receipts for the month's salary, and leaves the money with the secretary, the corporation is not liable for the default of the secretary in failing afterwards to pay over the amounts.⁸ In order to render a corporation liable for services of an attorney employed by a subordinate agent, a delegation of authority to employ must be shown.⁹

ILLUSTRATIONS.—The articles of association provided that the directors should have power to appoint and remove agents

¹ *Western Bank v. Gilstrap*, 45 Mo. 419; *Kitchen v. R. R. Co.*, 59 Mo. 514; *Hoyt v. Thompson*, 19 N. Y. 207; *Burrill v. Nahant Bank*, 2 Met. 163.

² Morawetz on Corporations, sec. 249.

³ *Howard's Case*, L. R. 1 Ch. App. 561.

⁴ *Silver Hook Road v. Greene*, 12

R. I. 164; *Farmers' Mutual Ins. Co. v. Chase*, 56 N. H. 341.

⁵ *Gratz v. Redd*, 4 B. Mon. 186.

⁶ *York etc. R. R. Co. v. Ritchie*, 40 Mo. 425.

⁷ *Lohman v. R. R. Co.*, 2 Sand. 39.

⁸ *Gardner v. R. R. Co.*, 63 Cal. 326.

⁹ *Maupin v. Virginia Lead Mining Co.*, 78 Mo. 24.

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of the corporation. *Held*, that a contract with A, agreeing to appoint B the agent and manager of all the mining property of the corporation, and that B should be retained in that position until B should pay A out of the profits a certain sum which A claimed was due him, and that B should be removable at A's pleasure, was one which the directors had no power to make, and was not binding upon the corporation: *Flagstaff Silver Mining Co. v. Patrick*, 2 Utah, 304.

§ 419. Powers of Secretary and Treasurer. — The clerk of a corporation, unless the laws of the state or by-laws of the corporation provide otherwise, remains in office until another is chosen.¹ A signature by a corporation by their secretary is *prima facie* their act, and must be denied under oath.² The secretary is the proper person to prove the corporate books.³ He cannot, in the absence of special authority, bind the corporation by a "due bill" given a stockholder in consideration of his surrender of his stock.⁴ The secretary of a mining company has no implied authority to make an assignment of promissory notes belonging to the company.⁵

It is the duty of a treasurer to keep the moneys of his principal distinct from his own (unless a special agreement be made to the contrary), and to be able and ready at all times to pay over what balance he owes to his principal, and to pay it upon demand.⁶ The treasurer, who holds money to pay a dividend which has been declared, and who refuses to pay the dividend upon certain shares, upon the ground that he is himself the owner of the shares, is liable personally to an action of *assumpsit* for money had and received, brought in the name of the real owner of the shares, to recover the amount of such dividend.⁷ The treasurer, who is held out to the world as the

¹ *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

² *Frye v. Tucker*, 24 Ill. 180.

³ *Smith v. Natchez Steamboat Co.*, 2 Miss. 479.

⁴ *Gregory v. Lamb*, 16 Neb. 205.

⁵ *Blood v. Marcuse*, 38 Cal. 590; 99 Am. Dec. 435.

⁶ *Second Avenue R. R. Co. v. Coleman*, 24 Barb. 300.

⁷ *Williams v. Fullerton*, 20 Vt. 346.

proper agent to whom a payment to the corporation is to be made, is an agent to whom notice may be given as to the purpose for which the payment is made.¹ The treasurer has the right to negotiate notes or bills taken in the name of his office.² If the directors authorize their treasurer to indorse notes of the corporation to a third person, or if such treasurer is suffered to draw and accept drafts, to indorse notes payable to the corporation, and to do other similar acts whereby he is held out to the public as having the general authority implied from his official name and character, an indorsement made in pursuance of such express or implied authority passes a valid title to the indorsee.³ A treasurer has no authority to pay himself a claim he holds against it, unless the claim has been approved and its payment authorized by the corporation.⁴ If the power of the treasurer of an association, incorporated for the purpose of erecting and obtaining a monument, is expressly limited in the by-laws to the payment of such bills as have been approved by the directors in a particular form, he cannot bind the corporation by a negotiable promissory note on demand, given in part payment for the monument, although the directors have authorized a committee to contract for the same, and draw on the treasurer for the price, and the committee have accordingly contracted for the same, and the monument has been erected and approved by the corporation, and the committee have verbally authorized the treasurer to pay the price, and he thereupon, not having on hand sufficient money for the purpose, has executed the note.⁵ The treasurer of a corporation has not any authority to pay the debts of the corporation, nor set off the debts due from, by those due to, the company;⁶ nor to

¹ *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatchf. I.

² *Perkins v. Bradley*, 24 Vt. 66.

³ *Lester v. Webb*, 1 Allen, 34.

⁴ *Peterborough R. R. Co. v. Wood*, 61 N. H. 418.

⁵ *Torrey v. Dustin et al. Ass'n*, 5 Allen, 327.

⁶ *Brown v. Weymouth*, 36 Me. 414.

confess judgment for it;¹ nor to assume a debt against a third person.²

ILLUSTRATIONS. — On a bill by a savings bank to foreclose a mortgage, where the defense of usury was set up, there was proof that a premium had been paid to its treasurer for the loan, in pursuance of a contract made by him with the borrower in the name of the corporation. *Held*, that the premium must be presumed to have been paid to the corporation: *Dime Savings Inst. v. Mulford*, 31 N. J. Eq. 99. The treasurer of an incorporated joint-stock company, who was charged with the custody of the corporate seal, and of all the books relating to the issue and transfer of stock certificates, borrowed through a broker large sums of money on certificates fraudulently issued by himself. These certificates bore the signature of the president of the company, were countersigned by the treasurer, sealed with the corporate seal, and purported to be genuine in every respect. The lender of the money acted in good faith, not knowing for whom the money was wanted, and supposing the certificate to be genuine. *Held*, that the company was bound by the act of its agent, and was liable in damages to the lender of the money: *Tome v. R. R. Co.*, 39 Md. 36. An employee of a corporation was accustomed to leave part of his wages on deposit with the treasurer, the amount being indorsed on the pay-roll, supposing it was deposited with the corporation. This practice was not known to the other officers, and the treasurer appropriated the funds. *Held*, that the company was liable to the employee: *Carroll v. People's Ry Co.*, 14 Mo. App. 490.

§ 420. **President of Corporation—Powers of.**—It has been laid down in some cases that the president of a corporation has, as such, no greater power—except that of presiding officer—than any other member of the board of directors.³ The express powers of a president are usually, however, larger than this, and are given either by the charter or the by-laws of the corporation. He may, without express authority, perform all acts which are incident to the execution of the trust reposed in him, and which custom or necessity imposes upon the office.⁴ His powers,

¹ *Stevens v. Carp River Iron Co.*, 57 Mich. 427; *Walworth Co. Bank v. Loan Co.*, 14 Wis. 325; but see *Smith v. Smith*, 62 Ill. 493.

² *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

³ *Titus v. R. R. Co.*, 37 N. J. L. 498; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621; *Chicago etc. R. R. Co.*

however, to bind by contracts, extend only to matters arising in the ordinary course of its business.¹ If he was in the habit of acting as a business agent for the company with its knowledge and without objection, actual authority will be inferred from such acts, and the company will be bound by them.² His power to bind the company as its agent may be implied from acts and circumstances.³ When a corporate body intrusts its president, or other principal officer, with the conduct of its proper business, it thus clothes him with the power of a general agent, and the restrictions imposed privately on him will be immaterial to third parties.⁴ A vote of the directors that the president have full power and control of its business authorizes him to purchase the materials to be used in its operations, and to borrow money for the corporation, and give its note for the money borrowed.⁵ Where a corporation is embarrassed, and without funds to purchase its past-due outstanding bond, its president may purchase the same and hold it as against the company, but not if he purchase with the funds or credit of the company.⁶ The president has implied power to institute suit to enjoin a party from illegally using water belonging to the corporation;⁷ to take a lease of an office on behalf of a foreign corporation;⁸ to appear and confess a judgment against it;⁹ to indorse securities for transfer.¹⁰ With power to contract on its behalf, he has power to release a contract.¹¹ Where the president of

v. Coleman, 18 Ill. 297; 68 Am. Dec. 544. A corporation cannot be bound by a contract made by its president, unless power to bind it is given to him by the act of incorporation, or he is authorized by the corporation to make the contract; *Mount Sterling etc. Turnpike Road v. Looney*, 1 Met. (Ky.) 550; 71 Am. Dec. 491.

¹ *Blen v. Bear River etc. Co.*, 20 Cal. 602; 81 Am. Dec. 132.

² *Dougherty v. Hunter*, 54 Pa. St. 380.

³ *Northern etc. R. R. Co. v. Bastian*, 15 Md. 494.

⁴ *Graves v. Land Co.*, 3 Phil. 447.

⁵ *Castle v. Belfast Foundry Co.*, 72 Me. 167.

⁶ *Bradly v. Williams*, 3 Hughes, 26.

⁷ *Reno Water Co. v. Leete*, 17 Nev. 203.

⁸ *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13.

⁹ *Chamberlin v. Mammoth Mining Co.*, 20 Mo. 96.

¹⁰ *Caryl v. McElrath*, 3 Sand. 176.

¹¹ *Indianapolis Rolling Mill Co. v. R. R. Co.*, 120 U. S. 256.

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a private business corporation has previously been its attorney, and has general charge of its business, authority on his part to employ attorneys is implied.¹ He has the right to indorse and assign notes and mortgages given to it to aid in its construction, and the indorsee, before maturity, takes the notes free from any equities between the maker and the company.² Where notice is required to be given by the president of a bank, a notice by the president and directors, under the seal of the corporation, is sufficient.³ Presidents and cashiers of incorporated companies, acting as their executive officers, can make indorsements in their behalf by simply indorsing their own names, with their titles of office.⁴ That the president of a railroad usually gave notes of the company on printed forms, and signed them as president, will not prevent a recovery against the company upon a due bill not upon a printed form, and not signed as president, but is a mere circumstance to be weighed by the jury in determining whether or not the consideration passed to the company so as to make them liable.⁵ A president of a corporation has no authority *ex officio* to buy or sell land for the corporation.⁶ He cannot borrow money in its name and pledge its responsibility, unless authorized by its charter or by a by-law or resolution of the directors.⁷ He has no authority *ex officio* to execute a bond and warrant of attorney for an entry of judgment against the corporation.⁸ A corporation which, by its charter, can only act through its board of directors cannot contract, through its president, without the authority of the board, except as to matters of simple administration, which of necessity should be managed

¹ Wetherbee v. Fitch, 117 Ill. 67.

² Irwin v. Bailey, 8 Biss. 523.

³ Crawford v. State Bank, 5 Ala. 679.

⁴ State Bank v. Fox, 3 Blatchf. 431.

⁵ Richmond etc. R. R. Co. v. Snead, 19 Gratt. 354; 100 Am. Dec. 670.

⁶ Bliss v. Kaweah Canal and Irrigation Co., 65 Cal. 502; Blen v. Water Co., 20 Cal. 602; 81 Am. Dec. 132.

⁷ Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31.

⁸ Stokes v. New Jersey Pottery Co., 46 N. J. L. 237.

by the president without such authority.¹ A deed describing the grantors as a corporation, executed by the president thereof in his own name, and under his own seal, does not pass the title from the corporation.²

Although a president of a corporation should have consulted the board of directors before authorizing certain expenditures, yet if he acted in good faith, and did only what they would probably have authorized, he is not liable to the corporation for damages; nor can it set up his conduct, by set-off or otherwise, in bar of his action for his salary.³ Where the constitution and by-laws of a large corporation likely to be engaged in litigation are silent as to the duties of its president, he has authority to defend suits brought against it, and may apply for a writ of error, and employ and dismiss counsel, unless restrained by some act of the directors.⁴ A by-law of a railroad corporation authorizing its president to act as its "business and financial agent" does not authorize him to mortgage a locomotive owned and in use by it.⁵ A by-law giving the president of a corporation "the general charge and direction of the business of the company, as well as all matters connected with the interests and objects of the corporation," does not authorize him to do an act which, by another by-law, is expressly given to a committee.⁶ Where a board of directors refers a matter to a committee of three, one of whom is the president of the corporation, the president cannot act alone so as to bind the corporation.⁷ The president is liable for neglect in not taking a bond from the secretary, where the by-laws make it his duty to take bonds from the officers.⁸ The president of a corporation is not made liable

¹ *Bright v. Metairie Cemetery Ass'n*, 33 La. Ann. 58.

² *Hatch v. Barr*, 1 Ohio, 390.

³ *Davis v. R. R. Co.*, 22 Fed. Rep. 883.

⁴ *Colman v. West Virginia Oil etc. Co.*, 25 W. Va. 148.

⁵ *Luse v. R. R. Co.*, 6 Or. 125; 25 Am. Rep. 506.

⁶ *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269.

⁷ *Railroad Co. v. Ebling*, 12 Daly, 99.

⁸ *Pontchartrain R. R. Co. v. Paulding*, 11 La. 41; 30 Am. Dec. 709.

to an action for a personal injury merely by transmitting an order of the corporation to a servant, who in executing it uses illegal force; but if the order is issued by him on his own responsibility, he is liable.¹ On the death of the president, the vice-president may act in his stead, though that office was not provided for by name in the by-laws, the directors simply being authorized to create other offices, and they having created that of vice-president.² The president of a corporation properly elected holds over until another president is elected, although there is no special provision in the charter to that effect.³ The death of a bank president in whose name a judgment was obtained does not abate a suit brought in behalf of the bank.⁴ A contract entered into by the president of a corporation is binding upon the corporation, and not *ultra vires* and void, though the power to make contracts is vested in the board of directors, if the evidence sufficiently establishes a ratification by the directors *in pais* of the president's act.⁵ When the charter of a corporation provides that certain officers may be elected, and their salary fixed by a board of directors, and a president is thus elected, but without a salary being named, the law raises an *assumpsit* on the part of the corporation to pay a reasonable compensation for his services rendered after such election.⁶

ILLUSTRATIONS. — A note was made by the directors of one corporation, as individuals, and transferred to another corporation, one of the makers being payee and indorser, and president of both corporations. *Held*, that he could not consent for the creditor to any arrangement releasing or impairing the individual liability of himself or his co-directors: *Gallery v. National Exchange Bank of Albion*, 41 Mich. 169; 32 Am. Rep. 149. The president and superintendent of a corporation had authority to buy and sell material, and to make contracts for it. *Held*,

¹ *Hewett v. Swift*, 3 Allen, 420.

² *Colman v. West Virginia Oil etc. Co.*, 25 W. Va. 148.

³ *Olcott v. R. R. Co.*, 27 N. Y. 546; 84 Am. Dec. 298.

⁴ *Wright v. Rogers*, 26 Ind. 218.

⁵ *Pixley v. R. R. Co.*, 33 Cal. 183; 91 Am. Dec. 623.

⁶ *Gruny v. Pine Hill Coal Co., Ky.* 1888.

that their authority extended to releasing the purchaser (who had become unable to meet his payments), and to substituting a third person in his stead: *Indianapolis Rolling Mill Co. v. R. R. Co.*, 26 Fed. Rep. 140. The president of a corporation subscribed for stock in the name of the defendant, promising "to take care of it for him." There was also evidence tending to show that he transferred a portion of the defendant's stock. *Held*, that in all that the president did for the defendant, he must be regarded simply as the defendant's private agent, and that the character of his acts as such could not be affected by the fact of his presidency: *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. 450. A steamship company had virtually ceased to exist for all purposes of business, and for promoting the object of the charter as originally granted, all its powers had been taken away, its property was expended, and it was hopelessly insolvent. *Held*, that the president might contract on his individual behalf to run steamers, and do the business which the company had ceased to do, provided he put no duty, obligation, or restraint upon the company: *Murray v. Vanderbilt*, 39 Barb. 140. The president of a corporation had general discretionary powers as to all matters in the prosecution of the company projects; he bought a house, to be used as an office, and the trustees held their meetings in it during six weeks. *Held*, that even if he had no authority, the trustees had ratified his acts, and therefore that a subsequent rejection of the contract was of no avail, and could not excuse the company from payment: *Shaver v. Bear River etc. Co.*, 10 Cal. 396. An article in the by-laws of a religious corporation provided that the president should convene the board of trustees at least once in every month, and might call extra meetings, whenever in his opinion, or in the opinion of three members of that body, it should be deemed necessary for the interest or welfare of the congregation. Another article provided that a majority of the board might admit new members. The president, on application by four members of the board, refused to call a meeting thereof, after which a majority of the board convened without such call, after giving the president notice of the time and place of their intended meeting. *Held*, that the board thus convened had no power to elect new members of the corporation, and that all their acts were illegal and void: *State v. Ancker*, 2 Rich. 245.

§ 421. **Removal of Officers.**—The power of amotion, i. e., of removal of its officers for cause, is inherent in a corporation.¹ But a corporation cannot exercise the power

¹ Angell and Ames on Corporations, 270; 2 Kent's Com. 277.
tions, 408, 409; Wilcock on Municipal Corporations, 270; 2 Kent's Com. 277.

of amotion except for reasonable cause,—as to those officers who are of the essence of the corporation, that is, who have such voice or office in the management and direction of the corporation that without them its business could not be carried on, as directors of private corporations, or aldermen in municipal corporations.¹ As to mere ministerial officers, such as clerks, agents, or subordinates, they may be discharged as any other master may discharge a servant.²

The causes for which an officer may be removed were stated by Lord Mansfield in an English case,³ and his classification has been adopted in our courts.⁴ They are: 1. The commission of an infamous offense; or 2. A violation of official duty so gross as to amount to a breach of the tacit condition annexed to the office; or 3. An offense constituting not only a breach of official duty, but also matter indictable at common law. The power to remove directors is conferred in some cases by express statute, or the charter of the corporation, or the by-laws provide for such contingencies.⁵ Where by such statutory power the stockholders may remove for "reasonable cause," their discretion in deciding what is or is not such cause will not be inquired into (except in cases of fraud) by the courts.⁶ When they prescribe the terms and conditions under which the power can be exercised, their provisions must be pursued.⁷ Where, however, the charter enumerates certain causes for which removal will lie, whether this excludes the power to remove for causes not enumerated would depend on the legislative intent as gathered from the whole charter. Thus where power was given to

¹ Fuller v. Plainfield School, 6 Conn. 532. Wis. 63; Potter on Corporations, 725; Dillon on Municipal Corporations, 189.

² Angell and Ames on Corporations, sec. 426, 429.

³ R. v. Richardson, 1 Burr. 517.

⁴ Evans v. Philadelphia Club, 50 Pa. St. 107, 114; Com. v. St. Patrick's Society, 2 Binn. 441; 4 Am. Dec. 453; State v. Chamber of Commerce, 20

⁵ Hunter v. Ins. Co., 26 La. Ann. 13.

⁶ Inderwick v. Snell, 2 McN. & S.

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⁷ State v. Vincennes University, 5 Ind. 77, 89; State v. Bryce, 7 Ohio, pt. 2, pp. 82, 83.

appoint, "subject to removal *only* for," etc. this was held to limit the power of removal to the specified causes.¹ In the absence of statutory or charter power, a suit will lie at the instance of either the corporation or a stockholder to remove a director who is incapable or unwilling to perform his trusts.² But except in a gross case of misconduct, a director elected for the ordinary term of a year cannot be removed before that time.³

Charges must be made setting forth with substantial accuracy the grounds of complaint, and a reasonable notice of these charges, and of the time and place of hearing them, should be given to the party accused. A hearing of the evidence in support of the charges must be had, and an opportunity given to the party of making his defense, either in person or by counsel, and a sentence of the loss of the right to the office must be pronounced.⁴ In California it is held that the removal of mere private or ministerial officers of a corporation is a right which belongs to the corporation alone, and the courts have no jurisdiction to order such removal, or, it seems, to enjoin such officer from acting.⁵ The individual bankruptcy of a person who is a stockholder in and a director and officer of a corporation which is not in bankruptcy does not incapacitate him from exercising his functions as such officer, nor render *imoperative* and void, as to third parties, the acts and conveyances done and executed through him

¹ State v. Higgins, 15 Ill. 110.

² Morawetz on Corporations, sec. 543.

³ Taylor on Corporations, sec. 650.

⁴ State v. Vincennes University, 5 Ind. 89, 90; State v. Bryce, 7 Ohio, pt. 2, p. 82; State v. Adams, 44 Mo. 586, 587; Dillon on Municipal Corporations, sec. 188. But where an officer is removed because convicted of an infamous offense, it is not necessary to prefer charges and have a hearing before the corporation; the conviction in a court of law takes the place of

this. A vote passing a resolution reciting the offense and conviction, and declaring the right to the office forfeited, is all that is required: Angell and Ames on Corporations, 422. The stockholders of a corporation in which the general public has no interest may depose its officers, for causes stated in the charter or by-laws, without notice and trial: Adamantine Brick Co. v. Woodruff, 4 McAr. 218.

⁵ Neall v. Hill, 16 Cal. 145; 76 Am. Dec. 508; and see Griffin v. St. Louis Wine Co., 4 Mo. App. 595.

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as its representative.¹ Where, after a decision removing certain directors from office, they, on the same day, met and executed a note for the company, and on the next day the judgment was filed and recorded, it was held that they being *de facto* directors, the note was binding on the company.² The title of directors of a corporation, who are in under color of an election, cannot be inquired into in a suit in equity, instituted to restrain them from exercising the functions of directors, upon the ground of an irregularity in their election.³ The directors of a corporation against which judgment of ouster has been pronounced are individually answerable for the costs of the proceeding, though they had no direct agency in defending the suit.⁴ The effect of an amotion is to vacate the office, and the subsequent acts of the officer are not binding unless permitted by the corporation.⁵ But his rights as a member of the corporation are not affected.

Where the removal is unauthorized, because of insufficient cause, or because the proceedings were irregular and illegal, the officer may be restored by *mandamus*,⁶ except that the court will only in extreme cases, when the cause is sufficient and the proceedings simply irregular, compel the restoration, for the reason that the officer being still subject to removal in a new proceeding, the order will have little effect.⁷ A director improperly excluded from meetings by his co-directors has an individual right of action against them for the injury caused to him by such exclusion.⁸

¹ Atlas Bank v. F. B. Gardner Co., 8 Biss. 537.

² Mahoney Mining Co. v. Anglo-Californian Bank, 104 U. S. 192; San José Sav. Bank v. Lumber Co., 63 Cal. 179.

³ Hughes v. Parker, 20 N. H. 58.

⁴ People v. Ballou, 12 Wend. 277.

⁵ Dillon on Municipal Corporations, 194.

⁶ Fuller v. Plainfield School, 6 Conn. 532; State v. Chamber of Commerce,

20 Wis. 63; Sibley v. Carteret Club, 40 N. J. L. 295. And by the restoration the acts of the officer while so removed are made valid: Angell and Ames on Corporations, 431.

⁷ Dillon on Municipal Corporations, sec. 192; R. v. Griffiths, 5 Barn. & Ald. 735.

⁸ Fulbrook v. Richmond Mining Co., 27 Week. Rep. 377, the court saying: "This motion raises a question of importance, viz., whether a director who

§ 422. **Corporation Bound by Acts of Agents within their Authority.** — Corporations, like natural persons, are bound, and bound only, by the acts and contracts of their agents, done and made within the scope of their authority.¹ But to establish agency on behalf of a corporation, it is not indispensable to show a written authority, or vote or resolution of the corporation.² Drafts accepted by the treasurer of a corporation are presumed to be properly accepted by the corporation, there being no circumstances to indicate fraud or illegality; and in an action by the holder against the corporation as acceptor, the burden of proof is upon the defendant corporation to show that the plaintiff had knowledge that the acceptances were for accommodation, and that he was not a *bona fide* holder for value.³

ILLUSTRATIONS. — A trustee under a marriage settlement was also president and acting manager of a mining corporation, and in violation of his duty as trustee sold all the trust property at public auction, part of which he purchased at the sale, as manager of the company. *Held*, that the corporation was liable as a participator in the breach of trust: *Barksdale v. Finney*, 14 Gratt. 338.

is improperly excluded by his brother directors from the board is entitled to an order restraining his brother directors from so excluding him. As a director he is entitled to certain fees, and it is doubtful whether he could claim such fees if he did not attend meetings. Therefore, it seems to me, his exclusion is an individual wrong, and an invasion of his legal rights, for which the directors are personally liable. He has a right to take a part in the management of the company, and to vote at the meetings, and a right to know what takes place at the meetings, because it has sometimes been held that a director not attending is liable for what is done. Besides, he is in the position of a managing partner, and has a right to remain so, and to receive remuneration for his services. Therefore, for the injury done him by excluding him from the meetings, he has a right to sue; and when the decisions say that when a wrong

is done to the company by excluding a director from board meetings, the company must sue, that is, for a wrong done to the company, and not for one done to the individual. It may happen that the wrong is done to both; but in the case of an individual wrong, a share-holder cannot, on behalf of himself and others, not sufferers by the wrong, maintain an action for that wrong. Therefore the plaintiff here has a right of action."

¹ *Chicago etc. R. R. Co. v. James*, 22 Wis. 199; *Hayden v. Middlesex Tp. Co.*, 10 Mass. 397; 6 Am. Dec. 143; *Mott v. Hicks*, 1 Cow. 513; 13 Am. Dec. 550; *Rabassa v. Orleans Nav. Co.*, 5 La. 461; 25 Am. Dec. 200; *Lamm v. Port Deposit etc. Ass.*, 49 Md. 233; 33 Am. Rep. 246; *Peterborough R. R. Co. v. R. R. Co.*, 59 N. H. 335.

² *Williams v. Christian Female College*, 29 Mo. 250; 77 Am. Dec. 569.

³ *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123.

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§ 423. Acts of Agents beyond Powers of Corporation not Binding. — Acts of an agent in excess of the chartered powers of the corporation are of course not binding on the corporation.¹ Where a director assumes a power never delegated, such, for instance, as to tell a merchant that the corporation will be responsible for goods furnished to an employee of the corporation, the merchant cannot charge the corporation for goods furnished in the belief that the corporation would pay for them.² Where an agent of a railroad company is empowered "to procure a right of way," this does not give him power to promise an owner of land that the company will locate a depot in a certain place.³ The president of a corporation, who, in behalf of the corporation, attempts to bind it by a contract *ultra vires* the corporation, does not bind himself, the other party knowing that his action was not so intended.⁴ The officers of a corporation have no power to make or ratify a note given by one of their number to secure his individual indebtedness;⁵ nor to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business; and a party receiving such note with notice cannot recover it.⁶ A person dealing with a corporation is bound to know whether or not the officer or agent who represents it and acts in its name is authorized so to do. If he is, and the act is within the apparent scope of his authority, the dealer is not bound to have knowledge of intrinsic facts making it improper for him to act in that case.⁷ Though by the by-laws of a corporation an officer has power to make con-

¹ Morawetz on Corporations, sec. 60; *Rollins v. Clay*, 33 Me. 133; *The Floyd Acceptances*, 7 Wall. 666; *New Haven etc. R. R. Co. v. Hayden*, 107 Mass. 525; *Boynton v. Lynn Gaslight Co.*, 124 Mass. 197.

² *Rice v. Peninsular Club*, 52 Mich. 87.

³ *Houston etc. R. R. Co. v. McKin-* ney, 55 Tex. 176.

⁴ *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

⁵ *Hall v. Turnpike Co.*, 27 Cal. 255; 87 Am. Dec. 75.

⁶ *Hall v. Turnpike Co.*, 27 Cal. 255; 87 Am. Dec. 75.

⁷ *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123.

tracts and execute conveyances, yet where a contract is made directly with the corporation and registered on its books, any papers executed by the officer to carry the contract into effect are *prima facie* unwarranted, in so far as they depart from the terms agreed upon and so registered.¹

§ 424. Acts of Agents not in Form Required by Charter not Binding.—In like manner, the acts of an agent not in the form required by the charter are not binding on the principal.²

§ 425. Agent with General Powers—Third Parties not Presumed to Know Limitations of his Power.—But where an agent has general power to do similar acts, his power in the particular case depending on the existence of facts peculiarly within the knowledge of the principal, a party dealing with him has a right to presume his authority, and the corporation will be bound by his acts or contracts.³ Officers of a corporation are special and not general agents, consequently they have no power to bind the corporation except within the limits prescribed by the charter and by-laws. Persons dealing with such officers are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws. Nor is there any grant of power in the name by which such officer is

¹ East Rome Town Co. v. Brower, Ga. 1888.

² McCullough v. Moss, 5 Denio, 567; Beatty v. Marine Ins. Co., 2 Johns. 109; 3 Am. Dec. 401; Dawes v. North River Co., 7 Cow. 462; Hemming v. U. S. Ins. Co., 47 Mo. 425; Murphy v. Louisville, 9 Bush, 189; Salem Bank v. Gloucester Bank, 17 Mass. 1; 9 Am. Dec. 111; Badger v. Am. Ins. Co., 103 Mass. 244; Safford v. Wyckoff, 4 Hill, 446; Gordon v. Preston, 1 Watts, 385; 26 Am. Dec. 75; Head v. Providence Ins. Co., 2 Cranch, 127;

People Ins. Co. v. Westcott, 14 Gray, 440; St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192; 54 Am. Dec. 340.

³ New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30; West St. Louis Bank v. Shawnee Bank, 95 U. S. 557; East River Nat. Bank v. Gove, 57 N. Y. 597; Ossipee Manufacturing Co. v. Canney, 54 N. H. 295; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; 19 N. Y. 312; Moss v. Mining Co., 5 Hill, 137; Royal British Bank v. Turquand, 6 El. & B. 327; Ryan v. Dunlap, 17 Ill. 40; 63 Am. Dec. 334.

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designated.¹ Directions and assurances made by the managing agent and superintendent of a company, if made within the general scope of his powers and duties, are binding upon the company, although not authorized by them, unless the party who claims to have acted in reliance upon them is chargeable with notice of the want of authority.²

ILLUSTRATIONS. — The president of a railroad company fraudulently issued certificates of stock, properly signed and sealed, in excess of the amount authorized by law. *Held*, that the stock should be treated as genuine in the hands of *bona fide* holders: *Willis v. Fry*, 13 Phila. 33. The president and treasurer of a railroad corporation confided to a clerk the duty of filling up and supplying certificates to the holders of coupons. The certificates were delivered, signed, to the clerk, who fraudulently filed them up, and put them on the market, whence they came into the hands of innocent purchasers for value, without knowledge of the fraud. *Held*, that the railroad corporation was responsible for the fraud of its clerk, and must bear the loss: *Western Maryland R. R. Co. v. Franklin Bank*, 60 Md. 36.

§ 426. **Third Person Presumed to Know Limitations in Charter.** — A person dealing with the agent of a corporation is bound to know the limits of his authority as contained in the charter or articles of association.³ Under a statute providing that officers of a corporation shall have no powers except such as are conferred by resolution or by-laws of the stockholders, which by-laws must be filed with the county recorder, after which all contracts made by such officers in violation of the by-laws, or in excess of their powers under them, shall be void as against the corporation, but binding upon all officers making them or dissenting therefrom, such officers, by virtue of their office, acquire no power whatever. Their office is der-

¹ *Adrianse v. Roome*, 52 Barb. 399.

² *Spelman v. Fisher Iron Co.*, 56 Barb. 151.

³ *Merritt v. Lambert*, 1 Hoff. Ch. 168; *Silliman v. R. R. Co.*, 27 Gratt. 119; *Root v. Wallace*, 4 McLean, 8; *Pearce*

v. R. R. Co., 21 How. 443; *Hoyt*

Thompson, 19 N. Y. 207; *Alexander*

v. Cauldwell, 83 N. Y. 480; *Bocock v.*

Allegheny Coal etc. Co., 82 Va. 913;

3 Am. St. Rep. 128.

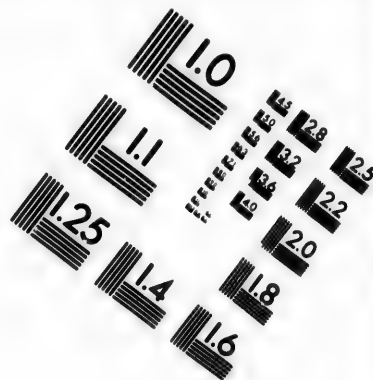
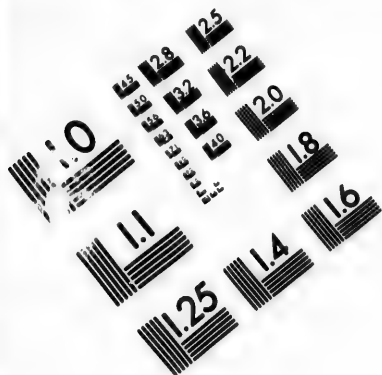
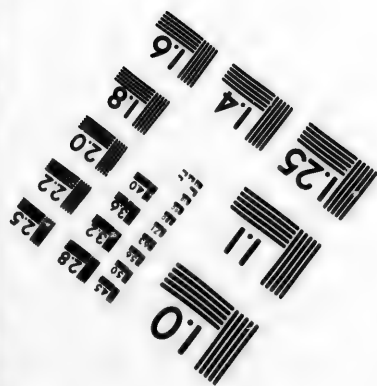
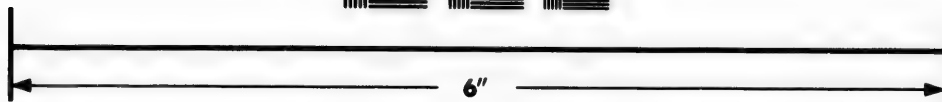
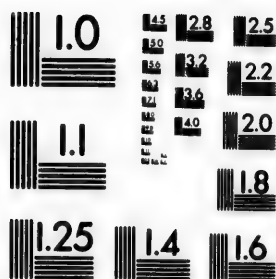
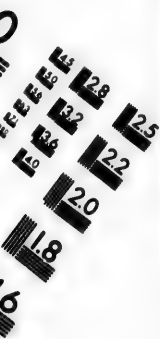


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mant until they have been vested with power by by-laws adopted and filed by the corporation. Until then their personal liability does not begin; they have no power *ex officio*, and can do no act and make no contract which will be binding upon the corporation.'

§ 427. But not By-laws or Regulations of Company.

— But this rule does not extend to the rules or by-laws of the corporation.² A by-law which is a mere rule for the government of the officers of the corporation in conducting their own business can have no effect upon the contracts of the corporation with other parties.³ But it was held in a New York case that the president of a manufacturing company, organized under the general act of 1848, cannot lawfully bind it in the purchase of goods required in its business, where there is a resolution to the contrary on its books, even if the other party has no notice thereof, unless there has been a well-recognized general course of dealing creating an implied authority.⁴

§ 428. Liability of Corporation for Fraudulent Representations of Agents.—The liability of a corporation for the fraudulent representations of its agents depends on the same principles as its liability for their contracts, as shown in the previous sections.⁵

ILLUSTRATIONS.—The treasurer of a private corporation, whose duty it was to issue certificates of the stock of the corporation, fraudulently issued certificates, regular in form, but not representing any real stock, and pledged them to secure money borrowed by himself. *Held*, that the corporation was liable to the pledgee, who had no notice of the fraud, for the amount lent by

¹ Hall v. Crandall, 29 Cal. 567; 89 Am. Dec. 64.

² Smith v. Smith, 62 Ill. 493; Wild v. Bank, 3 Mason, 506; Samuels v. Holliday, 1 Woolw. 400; Jackson Ins. Co. v. Cross, 9 Heisk. 283; Kingsley v. Ins. Co., 8 Cush. 393; Fay v. Noble, 12 Cush. 1; Mechanics' etc. Bank v. Smith, 19 Johns. 115.

³ Samuels v. Central etc. Ex. Co., McCahon, 214. A stockholder is not chargeable with notice of rules adopted by the directors: Pearsall v. Tel. Co., 44 Hun, 532.

⁴ Westerfield v. Radde, 7 Daly, 326.

⁵ New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30.

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him, with interest: *Tome v. R. R. Co.*, 39 Md. 36; 17 Am. Rep. 540. The general manager of a corporation, who was authorized to collect its checks, etc., presented a check belonging to it to a bank for payment. By mistake, the bank overpaid him. *Held*, that the corporation was liable for the amount of the overpayment, without regard to whether the manager accounted to the corporation for the amount: *Kansas Lumber Co. v. Central Bank*, 34 Kan. 635.

§ 429. **Unauthorized Act of Agent may be Ratified by Corporation.**—An unauthorized act of an agent or agents may be ratified by the corporation, and will then bind it.¹ The corporation cannot afterwards dispute his authority on the ground that he was not regularly appointed by the directors.²

§ 430. **Or by Superior Agent.**—An act performed by an inferior agent without authority may be ratified by a superior agent in some cases. The directors of a corporation, for instance, have, in very many cases, power to ratify the unauthorized acts of inferior agents of the corporation.³

§ 431. **Ratification may be Inferred from Conduct.**—A ratification need not be in words, but may be implied from conduct or acquiescence.⁴ A binding contract may be implied from the acts of a corporation, without proof of an express vote.⁵ It is immaterial as against strangers whether the person acting as managing director of a cor-

¹ Morawetz on Corporations, sec. 74; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Watt's Appeal*, 78 Pa. St. 370; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128; *Blen v. Water and Mining Co.*, 20 Cal. 602; 81 Am. Dec. 132. See title Agency, *supra*.

² *Flynn v. R. R. Co.*, 63 Iowa, 490.

³ *Fleckner v. Bank*, 8 Wheat. 338; *Kelsey v. Bank*, 69 Pa. St. 426; *Sherman v. Fitch*, 98 Mass. 59; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315.

⁴ *Kelsey v. National Bank*, 69 Pa.

St. 426; *Payson v. Stoevers*, 2 Dill. 427; *Walworth Bank v. Farmers' Trust Co.*, 16 Wis. 629; *Chicago etc. R. R. v. James*, 24 Wis. 388; *Daist v. Gale*, 83 Ill. 136; *Perry v. Simpson*, 27 Conn. 520; *Pacific R. R. Co. v. Thomas*, 19 Kas. 256; *Union Gold Mining Co. v. National Bank*, 96 U. S. 640; *Blen v. Bear River W. & M. Co.*, 20 Cal. 602; 81 Am. Dec. 132; *Bank of United States v. Dandridge*, 12 Wheat. 64; *Bank v. Comegys*, 12 Ala. 772; 46 Am. Dec. 278.

⁵ *Canal Bridge v. Gordon*, 1 Pick. 296; 11 Am. Dec. 171.

poration received a specific appointment to that position from the board of directors, if he has long acted in that capacity without objection, and if his services as such have been invariably accepted.¹

ILLUSTRATIONS.—The cashier of a bank, having agreed to discharge his duties without compensation, appropriated funds of the bank for compensation. Knowing that the rules of the bank forbade interest on demand certificates, he issued demand certificates on interest to himself, and took funds of the bank to pay such interest. He also sold bonds belonging to the bank to himself for less than their value. These transactions were entered on the bank books, but the directors had no actual knowledge thereof. *Held*, that a ratification by the bank could not be implied: *First National Bank of Fort Scott v. Drake*, 29 Kan. 311; 44 Am. Rep. 646.

§ 432. Act beyond Authority of Agent cannot be Ratified by Majority of Share-holders.—Acts in excess of the authority of the charter can only be ratified by all the stockholders. A majority cannot ratify such an act.²

§ 433. Implied Ratification by Stockholders from Conduct.—The question whether there has been a ratification by the share-holders of a corporation is generally a question of fact. Proof that every individual share-holder concurred is not essential. It is sufficient if it appear that the act in question was generally known among the share-holders, and that none of them objected.³ These circumstances have been held evidence of ratification on the part of the share-holders; viz., that the share-holders, knowing of the unauthorized act having been performed by their agents, took no steps to set it aside or to disaffirm it;⁴ that the share-holders have abstained from inquiring

¹ Walker v. R. R. Co., 47 Mich. 338.

² Marsh v. Fulton Co., 10 Wall. 676; Hazard v. Durant, 11 R. I. 196; Phosphate of Lime Co. v. Green, L. R. 7 Com. P. 43.

³ Morawetz on Corporation, sec. 79.

⁴ Phosphate of Lime Co. v. Green L. R. 7 Com. P. 43. In Kent v.

Quicksilver Mining Co., 78 N. Y. 187, Folger, J., says: "Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, where it is not needed that there be an express assent thereto on the part of stockholders to work an equitable estoppel

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into the affairs of the company and attending its meetings;¹ that the corporation has accepted the benefits of the act;² that a share-holder or share-holders have not protested against a vote of the majority, though they did not join in it.³ Stockholders of a corporation who do not vote against the re-election of directors may be deemed to acquiesce, by such omission, in acts of such directors done prior to the re-election, and of which such stockholders had information sufficient to put them on inquiry, and are not entitled afterward to have those directors suspended on the ground of misconduct previous to the re-election.⁴ Where, at the meeting of a board of directors of a corporation formed for purposes of pecuniary profit, an act is ordered to be done without objection either then or subsequently made to the regularity of the meeting by any director or stockholder, and the act thus authorized is afterwards performed, its legality cannot afterwards be questioned in a suit in equity on the ground of irregularity.⁵ If stockholders would impeach transactions entered into on behalf of the corporation by the fraud of its directors, they must act promptly; they cannot, however, be charged with acquiescence by remaining still while some of their number are seeking to impeach the transactions.⁶ Where the directors have transferred its original charter without authority of stockholders, and such stockholders have subsequently participated in the company's

upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken

without loss. It is the doctrine of equitable estoppel, which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity."

¹ *Morawetz on Corporations*, sec. 79.

² *Burrill v. Nahant Bank*, 2 Met. 163; 35 Am. Dec. 395.

³ *Riche v. Ashbury Carriage Co.*, L. R. 9 Ex. 224.

⁴ *Ramsey v. R. R. Co.*, 7 Abb. Pr., N. S., 156; 38 How. Fr. 193.

⁵ *Samuel v. Holladay*, 1 Woolw. 400.

⁶ *Metropolitan etc. R. R. Co. v. R. R. Co.*, 14 Abb. N. C. 103.

business under a new management, or permitted the scheme to be carried out without objection, they are estopped from denying the validity of the transfer.¹ Where the bank account of a mining company is overdrawn by its president and secretary, without special authority of its directors, the company will, notwithstanding, be held liable for the overdraft, if their acts in this respect be subsequently ratified by the directors. Such ratification may be made by their ordering the issue of a note of the company for the amount overdrawn.² When the directors have allowed the president to purchase locomotives, and have afterwards taken possession of them and acquiesced in their use on the company's road for several years, they cannot repudiate the president's authority to draw bills in payment for them.³ Where stockholders sanctioned a contract under which moneys were loaned to a corporation by its directors, and its bonds therefor secured by a mortgage given, and the moneys have been properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which the directors sustained to it.⁴ A bill to restrain a corporation from employing its assets in excess of its corporate powers must show due diligence to prevent the same. The right to restrain ceases when the members have consented to the rule of the majority within such powers.⁵

ILLUSTRATIONS. — The constitution and by-laws of an association provided that its business should be conducted upon the cash principle, and that no credit should in any case be given. *Held*, that the holder of a note against the association might prove that the cash system was abandoned, that goods were sold on credit, and the money was hired with the knowledge and consent of the association: *Dow v. Moore*, 47 N. H. 419. By the by-laws of the defendant corporation, the executive committee, which was empowered to hire rooms, required for a

¹ *Upton v. Jackson*, 1 Flap. 413.

⁴ *Hotel Company v. Wade*, 97 U. S.

² *Anglo-Californian Bank v. Ma-* 13.
honey Mining Co., 5 Saw. 255.

⁵ *Leo v. R. R. Co.*, 19 Fed. Rep.

³ *Olcott v. R. R. Co.*, 27 N. Y. 546. 283.

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quorum to transact business two directors and the president, and if the latter were absent a president *pro tem.* must be chosen. Two of this committee met informally in the absence of the president, and without electing any *pro tem.* notified the agent of the plaintiff corporation, who was a third member of such committee, that they would hire the rooms to be let by the plaintiff corporation. The defendants never occupied the rooms. *Held*, on suit brought for rent, that there was no contract made which was binding on the defendants, and no ratification of the informal action by the subsequent acts of the corporation: *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw. 436. The U., a rolling-stock company, and the A., a railroad company, by their respective boards of directors, entered into a contract whereby the U. agreed to supply the A. with all the rolling stock required in the operation of the A.'s railroad for seven years, at an agreed monthly rental. The five persons composing the A.'s board were members of the U.'s board, which consisted of thirteen persons. At the meeting of the U.'s board, at which the contract was confirmed, there were present only eight directors, two of whom were directors of the A. The U. supplied the rolling stock as agreed, and the A. received and used the same for nearly two years and a half, when the contract was terminated. *Held*, that even if the contract was voidable in equity at the election of the U. within a reasonable time, for want of a quorum of directors at the meeting who were not directors of the A., the delay in exercising the election to avoid it operated as a waiver of the right so to do: *United States Rolling Stock Co. v. R. R. Co.*, 34 Ohio St. 450; 32 Am. Rep. 380. A corporation paid a bill for furniture contracted by A, and subsequently used other furniture also bought by him. *Held*, that they were liable therefor, as having made A their agent, though he had never been appointed by any act under the corporate seal: *Bancroft v. Wilmington Conference Academy*, 5 Del. 577.

§ 434. **What Acts cannot be Ratified.**—Acts in violation of the charter of the corporation or contrary to law or statute are void, and cannot be ratified.¹ A corporation cannot ratify a contract made by their agent which they could not lawfully authorize.² A proposition from the officers of a corporation to settle a suit brought against the corporation for malicious prosecution does not import a ratification of the act or charge complained of therein.³

¹ In re Comstock, 3 Saw. 218; Tippecanoe Co. v. R. R. Co., 50 Ind. 86.

² Downing v. Mount Washington etc. Co., 40 N. H. 230.

³ Green v. South. Ex. Co., 41 Ga. 515.

CHAPTER XXVII.

RIGHTS AND LIABILITIES OF STOCKHOLDERS AND OF CREDITORS OF THE CORPORATION.

- § 435. The contract of membership — How created.
- § 436. Statutory method of becoming a stockholder must be followed.
- § 437. *De facto* corporation — Subscriber for shares not liable until corporation legally organized.
- § 438. Corporator cannot avoid his contract because corporation not duly organized.
- § 439. Subscribers not stockholders until all shares have been taken.
- § 440. Agreements to form corporation — Inchoate corporation.
- § 441. Mutual assent necessary to contract of membership.
- § 442. Preliminary deposit with subscription — When a condition precedent.
- § 443. Proof of contract of membership.
- § 444. Liability of stockholder to contribute his share of capital stock.
- § 445. Liability of subscriber — Capital agreed must be subscribed.
- § 446. Other conditions precedent.
- § 447. Assessments and calls — Who may make.
- § 448. Notice of time and place of payment, when requisite, and how given.
- § 449. Liability of subscriber after abandonment of enterprise.
- § 450. Subscriptions upon conditions.
- § 451. Subscriptions upon conditions — When subscriber held unconditionally.
- § 452. Subscriptions obtained by fraud, when voidable.
- § 453. When not voidable.
- § 454. Laches of subscriber.
- § 455. Stockholder cannot rescind contract.
- § 456. Violation of charter no ground for rescission.
- § 457. Forfeiture of shares for non-payment of assessments.
- § 458. Right to transfer shares.
- § 459. When stockholder liable notwithstanding transfer.
- § 460. Effect of transfer of shares.
- § 461. Formalities in transfer required by charter must be observed.
- § 462. Equitable assignments.
- § 463. Assignment by indorsement of certificate.
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- § 465. Lien of corporation on shares.
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- § 467. Liability of corporation for making or permitting unauthorized transfers.
- § 468. Status of shares as property.
- § 469. What are "profits."

- § 470. Dividends and interest can only be paid out of profits.
- § 471. Distribution of profits — Discretion of directors.
- § 472. Stock dividends.
- § 473. Issuing new stock — Increasing the capital stock.
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- § 476. Stockholders' meetings — Notice of time and place essential.
- § 477. Who may call meetings.
- § 478. General and special meetings— Distinction.
- § 479. Adjourned meetings.
- § 480. Who has right to vote.
- § 481. Election of officers.
- § 482. Power of majority to make by-laws.
- § 483. By-laws held valid.
- § 484. By-laws held invalid.
- § 485. Individual stockholders cannot sue for injury to corporation.
- § 486. When stockholders entitled to relief.
- § 487. Discretionary powers of officers will not be interfered with at suit of stockholders.
- § 488. Stockholders' bill — Who may or must be complainants.
- § 489. Who may or must be defendants.
- § 490. Stockholders not personally liable on corporate contracts.
- § 491. Nor for debts of corporation.
- § 492. Capital stock a trust fund for creditors.
- § 493. Shares must be paid for in money or property.
- § 494. When property cannot be taken in payment of shares.
- § 495. Rights of a creditor to unpaid assessments.
- § 496. Personal liability of stockholders by statute.
- § 497. Construction of such statutes.
- § 498. Nature of personal liability.
- § 499. Personal liability for wages of employees and laborers.
- § 500. Rights of a *bona fide* holder of shares apparently paid up.
- § 501. Rights of creditors — To interfere in management of corporation.
- § 502. To prevent dissolution or alteration in charter.

§ 435. The Contract of Membership—How Created.—

Persons become stockholders either by original contract with the other members at the formation, or by substitution for some original share-holder.¹ Thus if the statute requires the subscriptions to be in writing, an oral sub-

¹ Morawetz on Corporations, sec. 255. A broker, purchasing stock for a customer, and treating it as his own, may be charged with the liability of a stockholder: *McKim v. Glenn*, 66 Md. 479. But the act of voting stock does not make voters absolute stockholders, either as between themselves and the corporation or creditors. They are still entitled to show that they held such stock as collateral security, and not otherwise: *Union Sav. Co. v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776.

scription is not valid.¹ It is competent evidence, to show a person to be a stockholder in a corporation, that he had subscribed for some shares therein; that his name was entered upon the records of the corporation; that he had stated that he had taken such shares; and that the corporation treasurer had offered him his certificate therefor.² A receipt for a certificate of stock, written on the margin of the subscription-book, is a sufficient subscription for stock.³ Subscriptions for shares in the stock of an incorporated company constitutes the subscriber a stockholder in such company, even though he fail to meet the subsequent calls on his subscription.⁴ A subscription to stock is not only an undertaking with the company, but with all other subscribers, and a subscriber cannot be permitted to set up a secret parol arrangement with the agents of the company, by which he may be released from his subscription, while his fellow-subscribers continue to be bound.⁵ A certificate issued in the ordinary form of certificates of stock, but containing a promise on the part of the corporation to pay interest thereon until the happening of a specified event, constitutes the person to whom it is issued a stockholder.⁶ A signature to articles of association, setting forth the name of the proposed company, the amount of the capital stock, and the number of shares, imports that the subscriber will take and pay for the number of shares set opposite his name.⁷ A writing reciting an association for the purpose of organizing a bank, and stating, among other things, "the names and residences of the share-holders, with the number of shares held by

¹ *Vreeland v. Stone Co.*, 29 N. J. Eq. 188; *Pittsburgh etc. R. R. Co. v. Gazzam*, 32 Pa. St. 340. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

² *New Hampshire Cent. R. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300. ³ *Miller v. R. R. Co.*, 87 Pa. St. 95; 30 Am. Rep. 349.

⁴ *Lohman v. R. R. Co.*, 2 Sand. 39. ⁵ *McLaughlin v. R. R. Co.*, 8 Mich. 100.

⁶ *Schaeffer v. Ins. Co.*, 46 Mo. 248; *Rensselaer etc. Plank Road Co. v. Barton*, 16 N. Y. 457, note.

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each," and subscribed by the incorporators, constitutes a subscription to the capital stock on the part of the signers, and binds them to pay for the number of shares set opposite their respective names.¹ A widow who assents to an order of distribution of her husband's estate, by which certain shares of stock are allotted to her, becomes a stockholder, and liable to creditors of the corporation, though she has not received the certificates of stock, and though they have not been transferred on the company's books.² If persons sign the subscription-book of a corporation, leaving the amount blank, intending that they shall be represented as subscribers for the purpose of influencing others, as to creditors seeking to recover unpaid subscriptions, such persons impliedly authorize the filling up of the blanks by those taking the subscriptions.³ An agreement to subscribe for stock in a corporation is not a subscription.⁴ One who signs a mere subscription paper, agreeing to take a number of shares in a corporation to be formed, is not liable thereon after the formation of the company.⁵ An action will not lie on a stock subscription, unless its terms express a promise to pay.⁶ An oral promise, pending the organization of a corporation, to take shares of the stock, does not constitute the promisor a stockholder or member, and will not support a note given by him to pay for such shares.⁷ The mere fact of subscribing to the stock of an incorporated company does not constitute the subscriber a stockholder; but it seems that such a subscription puts it in his power to become a stockholder, by compelling the corporation to give him the legal evidence of his being a stockholder,

Co. v. Badger,

87 Pa. St. 95;

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¹ Nulton v. Clayton, 54 Iowa, 425; 37 Am. Rep. 213.

² Coquard v. Marshall, 14 Mo. App. 80.

³ Jewell v. Rock River Paper Co., 101 Ill. 57.

⁴ Mt. Sterling Coalroad Co. v. Little, 14 Bush, 429.

⁵ Strasburg R. R. Co. v. Echter-

nacht, 21 Pa. St. 220; 60 Am. Dec. 49;

Hedge's Appeal, 63 Pa. St. 279;

McClure v. R. R. Co., 90 Pa. St. 271;

Peninsular R. R. Co. v. Duncan, 28

Mich. 132.

⁶ Odd Fellows' Hall Co. v. Glazier, 5

Harr. 172.

⁷ Fanning v. Ins. Co., 37 Ohio St.

339; 41 Am. Rep. 517.

upon his complying with the terms of the subscription.¹ One who signed, with others, a subscription paper, promising to take and pay for shares in a joint-stock association to build a hotel, most of which subscribers were afterwards incorporated, but the defendant was not one of them, is not bound by his subscription to pay for his shares to the corporation, there being no privity of contract.² The issue of a certificate of stock is not essential to make a subscriber a stockholder.³ Making a certificate and mailing it to a stockholder is regarded as the issuing of it.⁴ No certificate of stock need be tendered before bringing a suit for the subscription.⁵ The loss of plaintiff's certificates and the advertisement thereof being sufficiently established, the defendants cannot refuse to issue new certificates on the ground that a bond of indemnity is not furnished. The stock cannot be transferred by relator except upon the books of the respondent, and on the production of the certificates. This is sufficient protection to the company.⁶ The authority of an agent appointed to receive subscriptions to the stock of a company is exhausted by the act of receiving the subscriptions. The subscription instantly inures to the benefit of the company, creating a contract between it and the subscriber, which the agent cannot rescind.⁷ Where a corporation has no secretary or clerk, and the president has charge of the stock-books, a demand on the latter to make the necessary transfer of stock to a purchaser of outstanding shares is sufficient.⁸

ILLUSTRATIONS. — A stock subscription simply agreed "to take the amount of shares set against our respective names." *Held*, to impose no personal obligation to pay for the shares: *Belfast*

¹ *Busey v. Hooper*, 35 Md. 15; 6 Am. Rep. 350.

² *Machias Hotel Co. v. Coyle*, 35 Me. 405; 58 Am. Dec. 712.

³ *Butler Univ. v. Scoonover*, 114 Ind. 381.

⁴ *Jones v. R. R. Co.*, 17 How. Pr. 529.

⁵ *Vawter v. R. R. Co.*, 14 Ind. 174; *Hardy v. Merriweather*, 14 Ind. 203.

⁶ *State v. New Orleans Gas Light Co.*, 25 La. Ann. 413.

⁷ *Lowe v. R. R. Co.*, 1 Head, 659.

⁸ *Green Mount etc. Turnpike Co. v. Bulla*, 45 Ind. 1.

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etc. R. R. Co. v. Moore, 60 Me. 561. The state of North Carolina subscribed twenty-five thousand dollars to the stock of a corporation, to be paid in sums "not exceeding ten thousand dollars in any one year," and no time was specified when the state should become a stockholder. *Held*, that she became a stockholder upon subscription: *Attorney-General v. Cape Fear Nav. Co.*, 2 Ired. Eq. 444. An association was incorporated for the purpose of improving the breed of Holstein-Friesian cattle, and of disseminating information concerning them. *Held*, that the courts could not compel the admission of certain owners and breeders of such cattle to membership, membership being necessary, under the corporate by-laws, to the registration of cattle, and such registration constituting an important factor in their marketable price: *People v. Holstein-Friesian Ass'n*, 16 Abb. N. C. 307. A subscription of stock, "subject always to the by-laws, rules, and articles of incorporation," one of which was that the stock should be paid for after five hundred shares had been subscribed, and that ten per cent should be payable on the fifteenth of each month. *Held*, to render the subscriber a shareholder; and the installments to come due even if no assessments were made: *Waukon etc. R. R. Co. v. Dwyer*, 49 Iowa, 121. The members of a corporation took subscriptions on a sheet of paper, which was placed in a bound book used as a record of the company. The names of the subscribers and the amounts subscribed were then entered in the book by the commissioners appointed to open books of subscription. *Held*, that this was a sufficient subscription to the stock of the corporation: *Woodruff v. McDonald*, 33 Ark. 97.

§ 436. Statutory Modes of Becoming Stockholder must be Followed.—Where the charter or a general statute prescribes the mode in which a person shall become a stockholder, that method must be followed.¹ It is generally sufficient that the requirements be substantially complied with.² Where notice is directed to be given of the time and place for receiving subscriptions for stock in an incorporated company, the object is to prevent a monopoly of the stock, and the want of the notice is no defense to

¹ Morawetz on Corporations, sec. 13 Am. Rep. 179; *Ashtabula R. R. Co.* 258, 265; *Childs v. Smith*, 55 Barb. 45; *v. Smith*, 15 Ohio St. 328; *Browlee v. Carlisle v. R. R. Co.*, 27 Mich. 315; *R. R. Co.*, 18 Ind. 68; *Hamilton etc. Hibernia Corporation v. Henderson*, 8 R. R. Co. v. Rice, 7 Barb. 157; *Maltby v. R. R. Co.*, 16 Md. 422.

² *People v. R. R. Co.*, 45 Cal. 306;

one who does subscribe.¹ The failure of a corporation to issue certificates of stock to a stockholder is no defense to an action by the corporation against the stockholder for borrowed money.² Where the power to require payment from stockholders is vested in a board of directors, an action will not lie to recover installments, unless all the prerequisites of the charter have been complied with.³ Where the charter provides that the president and directors shall cause a certificate to be given to each shareholder, signed by them, and countersigned by the treasurer, certificates issued by the president alone, signed by him, and countersigned by the treasurer, without authority of the directors, and without consideration, are void. And since the president, in issuing such certificates, acts without the scope of his authority, the corporation is not liable for his act.⁴

ILLUSTRATIONS. — The constitution of a charitable corporation provided that any person could apply for admission by paying an admittance fee, and when declared elected, could, after signing the constitution, vote at all meetings and be eligible to office; and that each member should pay a certain amount yearly to the corporation. *Held*, that the signing of the constitution was not a prerequisite to membership; and that an action would lie by the corporation against a member who had not signed, for his yearly dues: *United Hebrew Benevolent Ass'n v. Benshimol*, 130 Mass. 325. The defendant had subscribed for additional stock, and his subscription was procured by the directors after the organization of the company, without the intervention of the commissioners named in the charter. The defendant had afterwards acted as a director. *Held*, that by so doing he should be deemed to have waived all objection, if any existed, to the regularity of his subscription: *Lane v. Brainerd*, 30 Conn. 565.

§ 437. **De Facto Corporation—Subscriber for Shares not Liable until Corporation Legally Organized.**—A subscriber for shares of a corporation not organized cannot

¹ *Hagerstown Turnpike v. Creeger*, 5 Har. & J. 122; 9 Am. Dec. 495; see also *Union Turnpike Co. v. Jenkins*, 1 Caines, 381.

² *Hazelett v. Butler Univ.*, 84 Ind. 230.

³ *Banet v. R. R. Co.*, 13 Ill. 504.

⁴ *Holbrook v. Fauquier etc. Turnpike Co.*, 3 Cranch C. C. 425.

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be held liable upon his subscription until the company has been duly incorporated, and all the steps required by law have been taken.¹ Signing a subscription paper before the execution of articles of association does not make the signer a stockholder.² But if one subscribes for shares in a corporation to be organized, and the corporation is organized and the shares accepted by the subscriber, he cannot repudiate his liability.³ One who subscribes for stock in a company, chartered but not organized, the charter providing for subscription before organization, is held to his subscription unless he expressly dissents before the charter is accepted.⁴ An action may be maintained by a corporation against an original subscriber on a promise made before the act of incorporation, if it is shown that he recognized it as binding after the incorporation.⁵ A subscription to a proposed corporation may be withdrawn at any time before application for the charter.⁶

ILLUSTRATIONS.—A subscription to the capital stock of a railroad company, made before its incorporation, and agreeing to take certain shares therein, *held*, to be valid upon its subsequent acceptance by the company, and payment of an assessment thereon, although the subscriber did not sign the articles of association, nor the subscription-book kept by the company: *Buffalo and Jamestown R. R. Co. v. Clark*, 22 Hun, 359. Under the general incorporation law, articles were filed to incorporate the Oregon Central Railroad Company with a capital stock of \$7,250,000, divided into 72,500 shares of \$100 each. Six persons subscribed one share each, and the seventh subscription was as follows: "Oregon Central Railroad Company, by G. L. Woods, chairman, seventy thousand shares,—seven million dollars." *Held*, that this was a nullity, and that a board of directors

¹ *Penobscot R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Burrows v. Smith*, 10 N. Y. 550; *Carlisle v. R. R. Co.*, 27 Mich. 315; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654.

² *Sedalia, Warsaw etc. R. R. Co. v. Wilkerson*, 83 Mo. 235.

³ *Inter-Mountain Publishing Co. v. Jack*, 5 Mont. 568.

⁴ *Gleaves v. Turnpike Co.*, 1 Sneed, 491.

⁵ *Vestry of Christ Church v. Simons*, 2 Rich. 368.

Muncy Traction Engine Co. v. De la Green, Penn. Sup. Ct. Dig., 1888, p. 171.

elected by said six persons could not lawfully transact business for the corporation: *Holladay v. Elliott*, 8 Or. 84.

§ 438. **Corporator cannot Avoid his Contract because Corporation not Duly Organized.**—Where a person has agreed to become a corporator, and has enjoyed the benefits and privileges of one, he cannot afterwards set up that the corporation was not legally organized, or had not complied with the requirements of the law.¹ A corporation may receive subscriptions to stock, and may sue thereon, before being fully organized.² But a stockholder is not estopped by his subscription to deny the lawful existence of a corporation prohibited by the state constitution.³ Where books of subscription are opened at different places, pursuant to notice under a general law, a subscription upon a paper is binding, though it be not literally a book.⁴ But a party to a contract with a pretended corporation, organized without law or under an unconstitutional one, is not estopped to deny its existence at the date of the contract. Whether plaintiff is a corporation or partnership, where the plaintiff's name *prima facie* imports a corporation, is a question which may be raised by an answer alleging want of parties in interest in the suit.⁵

§ 439. **Subscribers not Stockholders until all Shares have been Taken.**—Where the capital of the corporation is

¹ *Tar River Co. v. Neal*, 3 Hawks, 520; *Wilmington etc. R. R. Co. v. Thompson*, 7 Jones, 387; *Meadow Dam Co. v. Gray*, 30 Me. 547; *Dayton etc. R. R. Co. v. Hatch*, 1 Disn. 84; *Daubury etc. R. R. v. Wilson*, 22 Conn. 435; *Central Plank Road v. Clemons*, 16 Mo. 359; *Brookville etc. R. R. Co. v. McCarty*, 8 Ind. 392; *Heaston v. R. R. Co.*, 16 Ind. 279; 79 Am. Dec. 430; *Dutchess Manufacturing Co. v. Davis*, 14 Johns. 238; 7 Am. Dec. 459; *Anderson v. R. R. Co.*, 12 Ind. 376; 74 Am. Dec. 218; *Aspinwall v. Sacchi*, 57 N. Y. 331; *White v. Ross*, 15 Abb. Pr. 66; *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo etc. R. R.*

Co. v. Cary, 26 N. Y. 75; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *New Hampshire etc. R. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300; *Clark v. Navigation Co.*, 10 Watts, 264; *St. Charles Manufacturing Co. v. Britton*, 2 Mo. App. 290; *Chubb v. Upton*, 95 U. S. 655.

² *Oregon etc. R. R. Co. v. Scoggin*, 3 Or. 161.

³ *St. Louis Colonization Ass'n v. Hennessy*, 11 Mo. App. 555.

⁴ *Hamilton etc. Plank Road Co. v. Rice*, 7 Barb. 157.

⁵ *Heaston v. R. R. Co.*, 16 Ind. 279; 79 Am. Dec. 430.

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fixed by law, subscribers do not become stockholders until the whole amount has been subscribed.¹ Where the capital stock of a corporation is fixed at a given sum, divided into shares of a certain amount each, the capital must be fully subscribed before the subscriber can be subject to assessments,² unless there is a contrary provision in the articles, or in the general law under which the corporation is formed.³ The record of a corporation showing the requisite number of shares subscribed to authorize its organization, together with the names of the subscribers, etc., to have been duly ascertained and reported by a committee, which report was duly accepted, is sufficient evidence of due organization in an action upon a subscription to stock, there being no proof to the contrary.⁴ A stock subscription is not invalidated by the irresponsibility of other subscribers for shares necessary to be subscribed before the organization of the corporation, if such other subscriptions were made and accepted by the company in good faith, the subscribers being apparently responsible; and evidence of their irresponsibility is no defense to an action on a subscription of another shareholder.⁵ But the subscribers are nevertheless bound from the time of their subscription.⁶ It makes no difference in the stockholder's rights that the corporation has not issued the certificate of stock to which he is entitled.⁷

¹ Morawetz on Corporations, sec. 259; Peoria etc. R. R. Co. v. Preston, 35 Iowa, 115; Penobscot R. R. Co. v. Dummer, 40 Me. 172; 63 Am. Dec. 654; Central R. R. Co. v. Johnson, 30 N. H. 390; 64 Am. Dec. 300; Lewey's etc. R. R. Co. v. Bolton, 48 Me. 451; 77 Am. Dec. 236; Hale v. Sanborn, 16 Neb. 1. Until the entire capital stock of a corporation organized under a general law is subscribed for and taken, a delinquent stockholder is not liable, unless the contract of subscription, certificate, or general incorporation law contains a provision to that effect, or the stockholder has waived

the condition as to taking all the stock: Haskell v. Worthington, 94 Mo. 560; *aliter*, Willamette etc. Co. v. Stannus, 4 Or. 261.

² Pale v. Sanborn, 16 Neb. 1.

³ Hughes v. Antietam Manufacturing Co., 34 Md. 316.

⁴ Penobscot R. R. Co. v. White, 41 Me. 512; 66 Am. Dec. 257.

⁵ Penobscot R. R. Co. v. White, 41 Me. 512; 66 Am. Dec. 257.

⁶ Lake Ontario R. R. Co. v. Mason, 16 N. Y. 451.

⁷ Chester Glass v. Dewey, 16 Mass. 94; 8 Am. Dec. 123.

ILLUSTRATIONS. — In a suit by a corporation on a stock subscription, the defense was that the agreed number of shares had not been *bona fide* subscribed so as to make the subscription binding. *Held*, that the original subscription-book, made up by copying from lists which were carried around to solicit subscriptions, and accepted by the directors, was admissible; not so the declarations of another subscriber that he did not intend to pay for the subscription he had made: *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233. The defendant subscribed for one share in the plaintiff corporation, and agreed to pay the same in such assessments as the directors for the time being might order. The act of incorporation fixed the number of shares at ten thousand, and before that number was subscribed for, the directors made sundry assessments to nearly the amount of the share. *Held*, that the shares not being all subscribed for, the assessments could not be recovered: *Contoocook Valley R. R. Co. v. Barker*, 32 N. H. 363.

§ 440. **Agreements to Form Corporation — Inchoate Corporation.** — Where a number of persons mutually agree to become share-holders, and form a corporation to be afterwards incorporated, the obtaining of the charter makes them stockholders.¹ A stock subscription made in contemplation of a charter to construct a railroad is a valid contract, and can be enforced.² A subscription to stock of a company for building a hotel, made before the creation of the company, was held to take effect as an agreement on its acceptance by the company when organized, and to bind the subscribers to take the shares

¹ In *Athol Music Hall Co. v. Carey*, 116 Mass. 471, the law of such inchoate corporations is thus stated: "In agreements of this nature, entered into before the organization is formed or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promise, in whose name alone suit can be brought. The promise of each subscribers, 'to and with each other,' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the

others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights, in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associates."

² *Tonica etc. R. R. Co. v. McNeely*, 21 Ill. 71.

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and pay therefor as the board of directors might require, even before the building of the hotel.¹ Each subscription to a common fund for a common purpose is a contract by each associate with his fellows in consideration of similar contracts by them to contribute to the common fund the amount subscribed, and when the full sum is subscribed and the association organized, raises a duty and liability on the part of each subscriber to pay the sum subscribed.² Persons who have entered into articles of association with the intention of becoming incorporated, but who have failed to perfect an incorporation, are individually liable upon a contract which they may be found to have authorized, or which they may have ratified, although such contract may have been in terms the contract of the association or assumed corporation.³

§ 441. **Mutual Assent Necessary.**—Mutual consent is necessary to the contract.⁴ Thus if a subscription is made in a person's name without his authority, he is not bound.⁵ If one subscribes to the capital stock of a corporation for and in the name of another without authority, he thereby binds himself, and becomes the equitable owner of the stock. A transfer thereof from the person in whose name the subscription is made is not necessary; it is sufficient if the stock is carried to the account of the subscriber on the stock-ledger of the company.⁶ So if the proposal is changed in any way without his consent, he is not bound.⁷ A special statute incorporating certain persons for purposes of private advantage or emolument

¹ Red Wing Hotel Co. v. Friedrich, 26 Minn. 112.

² Edinboro Academy v. Robinson, 37 Pa. St. 210; 78 Am. Dec. 421.

³ Johnson v. Corser, 34 Minn. 355.

⁴ Morawetz on Corporations, sec. 263.

⁵ Ticonic Water Power Co. v. Lang, 63 Me. 480. A person subscribing for another without authority is not per-

sonally bound, but is liable to an action for damages: Mill Dam Co. v. Ropes, 9 Pick. 187; 19 Am. Dec. 363.

⁶ State v. Smith, 48 Vt. 266.

⁷ Dorris v. Sweeney, 60 N. Y. 463; Dutchess etc. R. R. Co. v. Mabbett, 58 N. Y. 397; Southern Hotel Co. v. Newman, 30 Mo. 118; Richmond Fact. Ass'n v. Clarke, 61 Me. 351; Mahan v. Wood, 44 Cal. 462.

does not bind any person named therein, unless he consents thereto.¹ One railroad corporation, merely from having bought the road-bed of another, with intent to complete the road, has no right to purchase the vendor's stock subscriptions, and enforce them against the subscribers.² An act of the legislature by which "the members of" several mutual fire insurance companies are made a new corporation, and which "shall not affect the legal rights of any person," and is to take effect "when accepted by the members of said corporations," does not constitute a member of one of the old companies, who does not expressly consent to it, a member of the new corporation, although the act be duly accepted by a majority of the members of each of the old companies.³ The company may recover stock subscriptions procured by one who acted as agent, though not at the time authorized.⁴ A subscription to a railroad company is valid, though made to one who was not a commissioner to receive subscriptions, and though made under a mistaken belief that he might forfeit his stock at his pleasure.⁵ One who having by mistake signed an alphabetical list of subscribers to the company, instead of the stock subscription-book of the company, afterwards votes as a stockholder, is estopped to deny his subscription.⁶ The fact that the affairs of a corporation are unwisely managed, or its contracts not authorized by the articles of incorporation, will not relieve a stockholder from liability to pay his subscription for stock.⁷

ILLUSTRATIONS.—A subscription for shares was made by A for and in the name of B. Held, that B, by accepting the office of director, to which he was not eligible if not a stockholder, had recognized the validity of the subscription: *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654. Persons became subscribers to the stock of a corporation upon a promise by the

¹ *Ellis v. Marshall*, 2 Mass. 269; 3 Am. Dec. 49.

² *West End R. R. Co. v. Dameron*, 4 Mo. App. 414.

³ *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, 543.

⁴ *Walker v. R. R. Co.*, 34 Miss. 245.

⁵ *N. E. Railroad Co. v. Rodrigues*, 10 Rich. 278.

⁶ *St. Charles Mfg. Co. v. Britton*, 2 Mo. App. 290.

⁷ *Merrill v. Reaver*, 50 Iowa, 404.

president to take their stock off their hands when they should require it. *Held*, that there was no reciprocity in the agreement, and that the subscribers could not, after retaining the stock until the concern proved disastrous, call upon the president to fulfill his promise: *Stee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273. Defendant signed a paper authorizing J. to subscribe defendant's name to a subscription for shares, and J. entered defendant's name in a list of stockholders kept by the company, but did not subscribe to anything containing the elements of a contract of subscription. *Held*, that an action by the company against defendant for an assessment could not be maintained: *Grangers' Market Co. v. Vinson*, 6 Or. 172.

§ 442. Preliminary Deposit with Subscription—When a Condition Precedent.—The charters and general laws often provide that a certain money deposit must be made on each share of stock subscribed. Such statutes have been differently construed by the courts, some holding that actual payment of the required deposit is a condition precedent, and that a subscription made without the deposit is void;¹ others holding that such provision is simply for the benefit of the corporation, and if it does not object, the subscription is not illegal without the deposit, but the subscriber is bound.²

¹ *Jenkins v. Union Tp. Co.*, 1 Caines Cas. 86; *Wood v. R. R. Co.*, 32 Ga. 273; *Highland Turnpike Co. v. McKean*, 11 Johns. 100; *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 218; 6 Am. Dec. 273; *Hibernia Turnpike Co. v. Henderson*, 8 Serg. & R. 219; 11 Am. Dec. 593; *Fiser v. R. R. Co.*, 32 Miss. 359. A corporation whose charter and by-laws require each subscriber to its capital stock to pay a given percentage of his subscription in cash, at the time of subscribing, cannot enforce payment of a subscription where the required cash payment has not been made: *State Ins. Co. v. Redmond*, 1 McCrary, 308. Giving a promissory note for such sum is not payment in such case: *Leighty v. Susquehanna etc. Co.*, 14 Serg. & R. 434; *Boyd v. R. R. Co.*, 90 Pa. St. 169.

² *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Mitchell v. R. R. Co.*, 17 Ga. 574. A subscriber to the stock of

a corporation cannot escape liability to pay his subscription on the ground that he did not pay the sum required by statute to be paid at the time of subscription: *Pittsburg, Wheeling etc. R. R. Co. v. Applegate*, 21 W. Va. 172. Where an act of incorporation requires five per cent upon stock to be paid at the time of subscription, if the subscriber does not then pay it, but a judgment is afterwards rendered against him therefor, which he satisfies, he cannot object, to a suit brought for other assessments, that he did not pay the five per cent in cash when he subscribed: *Hall v. R. R. Co.*, 6 Ala. 741. The statutory requirement that subscriptions to capital stock shall be paid in cash is met by a payment by a certified check on a national bank, wherein the drawer has funds sufficient to meet it: *In re Staten Island Rapid Transit R. R. Co.*, 37 Hun, 422.

ILLUSTRATIONS.—The statute required, as a condition precedent to the incorporation of a company, that a certain amount of stock should be subscribed for, and ten per cent in cash thereon actually and in good faith paid in. *Held*, that payment of the ten per cent, made in good faith, by a check drawn against a sufficient fund, and which would have been paid on presentation, was sufficient: *People v. R. R. Co.*, 45 Cal. 306; 13 Am. Rep. 178. The charter of a corporation provided that its capital stock should be "divided into shares of one hundred dollars each, and five dollars on each share shall be paid at the time of subscribing." *Held*, that the payment of five dollars at the time of subscribing was not essential to the validity of a subscription for stock: *Minneapolis etc. R. R. Co. v. Bassett*, 20 Minn. 535; 18 Am. Rep. 376. A subscribed for a certain number of shares of a corporation organized under an act requiring a cash payment of ten per cent before a subscription could be received. A made no cash payment, but gave his check for ten per cent of the amount of his subscription, and countermanded payment of the check before it was presented for payment. *Held*, that there was no binding subscription: *Excelsior Grain Binding Co. v. Stayner*, 61 How. Pr. 456; 25 Hun, 91.

§ 443. **Proof of Contract of Subscription.**—A subscription made in writing cannot be proved by parol, unless the absence of the writing is accounted for.¹ The terms of the written contract cannot be varied or added to by evidence of a different oral agreement.² The name of the subscriber on the stock-book is *prima facie* evidence that he is a subscriber, and of the number of shares he subscribed for.³

§ 444. **Liability of Stockholder to Contribute his Share of Capital Stock.**—A person subscribing for shares in a corporation whose charter or articles provide that each share shall consist of a certain amount becomes liable to pay in the amount of shares he has subscribed.⁴ So where the capital is divided into shares of a certain amount each, an agreement to be a member implies a prom-

¹ *Vreeland v. Stone Co.*, 29 N. J. Eq. 188; *Pitts. etc. R. R. Co. v. Gaz.*, 32 Pa. St. 340.

² *Morawetz on Corporations*, sec. 269.

³ *Turnbull v. Payson*, 95 U. S. 421; *Marlborough etc. R. R. Co. v. Arnold*, 9 Gray, 159; 69 Am. Dec. 279.

⁴ *Morawetz on Corporations*, sec. 271.

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ise to contribute to the capital in proportion to the number of shares taken.¹ One who agrees to take and fill a share in the capital stock of a corporation is liable to pay all assessments legally made on that share.² So long as the corporate organization remains, the company may collect dues to pay its debts, though the undertaking for which it was created has been abandoned.³ But in Massachusetts, where a person agrees to take a certain number of shares, without promising to pay assessments, the only remedy on his failure to pay an assessment is to sell the shares,—he cannot be sued on an implied promise to pay assessments.⁴ A subscription to the stock with the understanding of the president that the stock is not to be paid for or held, but is to be canceled, is a fraud upon all subsequent subscribers, and holds the party thus subscribing to the responsibilities of a *bona fide* subscriber.⁵

ILLUSTRATIONS. — A agreed to take stock in a corporation, and then withdrew and was released, and his cash installment was never paid nor demanded during the year and a half that the corporation did business. Twelve years afterwards the assignee in bankruptcy of the corporation sought to hold A liable for an assessment. *Held*, that he was not liable, although his name appeared on the stock-book: *Cook v. Chittenden*, 25 Fed. Rep. 545. A subscribed to stock, stating that he took the number of shares opposite his name, and agreed to pay all assessments to be made by the directors. It was shown that the only assess-

¹ *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 67; *Hartford etc. R. R. Co. v. Kennedy*, 12 Conn. 514; *Fry v. R. R. Co.*, 2 Met. (Ky.) 316; *Kirksey v. Plank Road Co.*, 7 Fla. 23; 68 Am. Dec. 426; *Peoria etc. R. R. Co. v. Elting*, 17 Ill. 429; *Carson v. Arctic Mining Co.*, 5 Mich. 288; *Hughes v. Antietam Mfg. Co.*, 34 Md. 326; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336; *Instone v. Bridge Co.*, 2 Bibb, 576; 5 Am. Dec. 639; *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; *contra*, *Belfast etc. R. R. Co. v. Moore*, 60 Me. 561; *Same v. Cottrell*, 66 Me. 185; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423.

² *Buckfield etc. R. R. Co. v. Irish*, 39

Me. 44; *Fry v. R. R. Co.*, 2 Met. (Ky.) 314; *City Hotel v. Dickinson*, 6 Gray, 586; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336; *Dayton v. Borst*, 31 N. Y. 435; *Northern R. R. Co. v. Miller*, 10 Barb. 260; *Fort Edward etc. Plank Road Co. v. Payne*, 17 Barb. 567; *Troy etc. R. R. Co. v. Tibbits*, 18 Barb. 298; *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227; 93 Am. Rep. 697.

³ *Hardy v. Merriweather*, 14 Ind. 203.

⁴ *Andover Tp. Co. v. Gould*, 6 Mass. 40; 4 Am. Dec. 80; *New Bedford Corp. v. Adams*, 8 Mass. 138; 5 Am. Dec. 81; *Katama Land Co. v. Jernegan*, 126 Mass. 156.

⁵ *Robinson v. R. R. Co.*, 32 Pa. St. 334; 72 Am. Dec. 792.

ments the directors were authorized to make were calls of the capital stock. *Held*, that A had promised, not to pay at once for the whole sum subscribed, but to pay such assessments: *Grosse Isle Hotel Co. v. P'Anson*, 42 N. J. L. 10. Several persons signed a paper purporting to be an agreement to take stock in a corporation, which, as the paper recited, was about to be formed; afterwards the paper was signed by the president and secretary and the corporate seal affixed, and an action brought to recover from one of said subscribers the price named in the paper. The complaint did not state when the company was incorporated, and it was not shown that any of the subscribers joined in its formation or membership, or that it was authorized to sell the stock. *Held*, that the action could not be maintained: *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396. A complaint by a turnpike company to collect a stock subscription alleged that the same was "payable in such instalments and at such times as the company may direct"; that it had "ordered that the subscription be paid to the treasurer in three equal instalments in thirty, sixty, and ninety days from June 1, 1872"; and that it had demanded payment of the same on April 1, 1874, with which demand the defendant had refused to comply. *Held*, that the complaint sufficiently alleged the subscription to be due and unpaid, and that, according to the terms of the call, the money became due without either publication or demand: *Beckner v. Riverside etc. Turnpike Co.*, 65 Ind. 468.

§ 445. Liability of Subscriber—Capital Agreed must be Subscribed.—Where the capital of a corporation is fixed, a subscriber cannot be called upon for his proportion until the whole amount has been subscribed,¹ and

¹ *Stoneham Branch R. R. Co. v. Gould*, 2 Gray, 278, the court saying: "It is a rule of law too well settled to be now questioned, that when the capital stock and the number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken: *Salem Milldam v. Ropes*, 6 Pick. 23, and 9 Pick. 187; 19 Am. Rep. 363; *Cabot and West Springfield Bridge v. Chapin*, 6 Cush. 50; *Worcester and Nashua R. R. Co. v. Hinds*, 8 Cush. 110. This is no arbitrary rule; it is founded on a plain

dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken; he would be held, if liable to assessment, to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced towards it."

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the amount of the capital must be subscribed unconditionally¹ and in good faith.² An unconditional promise in a stock subscription to pay for a certain number of shares at par is binding, though the amount of capital stock was not fixed, and the minimum number of shares named in the charter was not subscribed for.³

§ 446. Other Conditions Precedent.—Where by the charter any acts are required to be performed before the subscribers can be called on to pay, these acts are a condition precedent to the liability of the subscribers on their stock subscriptions.⁴ One does not become liable as stockholder in a corporation by the issuing to him by the corporation of stock when the entry in the stock-book and the other records of the corporation show that such stock was issued as collateral security. To make one answerable as a stockholder to creditors of a corporation, he must be a stockholder as between himself and the corporation.⁵ A contract by which the promoters of a corporation agreed, with a subscriber for stock, to buy from him, within one year from the date of the contract, the stock taken by him, at the price paid by him therefor, is valid.⁶

§ 447. Who may Make Assessments and Calls.—If the charter requires that the assessments and calls be made by the board of directors, this must be done before the subscriber can be made liable.⁷ The number and qualification of directors fixed by the charter must be adhered to in order to make calls valid; but if payments were made

¹ *Central Tp. Co. v. Valentine*, 10 Pick. 142.

² *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Phillips v. Covington etc. Bridge Co.*, 2 Met. (Ky.) 219.

³ *Skowhegan etc. R. R. Co. v. Kinsman*, 77 Me. 370.

⁴ *Carlisle v. R. R. Co.*, 4 Ala., N. S., 76.

⁵ *Union Sav. Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776.

⁶ *Meyer v. Blair*, 109 N. Y. 600; 4 Am. St. Rep. 500.

⁷ *Bouton v. Dry Dock Co.*, 4 E. D. Smith, 420; *Banet v. R. R. Co.*, 13 Ill. 513; *Pike v. R. R. Co.*, 67 Me. 445; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314.

by any stockholder on calls issued by such or similar directors, such payments will be construed to show acquiescence in their conduct and authority, past and future, and the stockholder so acquiescing cannot afterwards object.¹ Paid corporate stock cannot be assessed without special authority in the charter or by statute.² When stock is, by contract, payable in installments, as called for by the board of directors, the calls should be clearly proved, and the recovery should be limited to the aggregate amount of the several calls not met by payment.³

§ 448. Notice of Time and Place of Payment—When Requisite and how Given.—Notice of the time and place for the payment of the assessment must be given if the charter so provides.⁴ A provision that notice is to be given in a particular mode is directory, and actual notice given in another manner is good.⁵ No demand for the payment of an assessment need be made other than the giving of the notice required by the by-laws of the corporation, in order to maintain an action therefor.⁶ When the charter expressly requires notice to be given in certain newspapers, and for a certain number of days, before the calls for installments shall be valid, the company must show a compliance with such condition precedent, before a recovery can be had on such calls.⁷ Where an

¹ Macon etc. R. R. Co. v. Vason, 57 Ga. 314.

² Atlantic De Laine Co. v. Mason, 5 R. I. 463.

³ South Georgia etc. R. R. Co. v. Ayres, 56 Ga. 230.

⁴ Macon etc. R. R. Co. v. Vason, 57 Ga. 314; Lewey's Island R. R. Co. v. Bolton, 48 Me. 451; 77 Am. Dec. 236; Tomlin v. R. R. Co., 23 Ill. 429. Where the charter of a company requires notice as a condition precedent to suits for installments of stock subscriptions, and there is no waiver of the notice, it must be given as required: Heaston v. R. R. Co., 16 Ind. 279; 79 Am. Dec. 430.

⁵ Miss. etc. R. R. Co. v. Gaster, 20 Ark. 455; Jones v. Sisson, 6 Gray, 288; Lexington etc. R. R. Co. v. Chandler, 13 Met. 311; Danbury etc. R. R. Co. v. Wilson, 22 Conn. 435. A contract to pay for stock in installments as assessed is a contract to pay them on demand, and the bringing of a suit is a sufficient demand: Smith v. R. R. Co., 12 Ind. 61; Eakright v. R. R. Co., 13 Ind. 404; Breedlove v. R. R. Co., 12 Ind. 114.

⁶ Penobscot R. R. Co. v. Dummer, 40 Me. 172; 63 Am. Dec. 654.

⁷ Macon etc. R. R. Co. v. Vason, 57 Ga. 314.

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act of incorporation requires that the place of payments of stock shall be designated in the notice requiring payment, a notice directing payment to be made to A B, residing in the city of D, is *prima facie* a compliance with the statute.¹ A statutory provision that the directors may require subscriptions to be paid "in such installments as they may deem proper," imports that a subscription does not fall due until notice of a call therefor made by the directors. Proof that it was duly mailed to a subscriber makes a *prima facie* case of notification.² If the charter does not require notice to be given to the share-holders after a call has been voted, no notice is necessary to hold a share-holder liable to pay the amount assessed.³

ILLUSTRATIONS. — A corporation was limited to fifteen per cent calls per annum, and ten per cent had already been called. *Held*, immaterial, that the last call did not specify the amount, time, or place of payment, the accompanying notice pointing out the time and place: *Andrews v. R. R. Co.*, 14 Ind. 169. A person subscribed for certain shares of stock, agreeing to pay all charges and assessments regularly levied or assessed by the board of directors, and no assessment or call was made. *Held*, in suit to recover the whole amount of the price of the stock, that the company could only recover the price after assessment or call: *Grosse Isle Hotel Co. v. P'Anson*, 43 N. J. L. 442. Subscribers to the stock of a railroad company stipulated to pay the first installment after the work should be commenced, "as shall hereafter be directed by the directors of said company." There was no stipulation for notice to the subscribers of the calling in of the installment. *Held*, that no proof of notice or demand, other than an order passed as above by the directors, and entered on the record-book, was necessary in a suit against a subscriber to recover said installment: *Ross v. R. R. Co.*, 6 Ind. 297.

¹ *Troy Turnpike etc. R. R. Co. v. McChesney*, 21 Wend. 296.

² *Braddock v. R. R. Co.*, 45 N. J. L. 363.

³ *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451; *Peake v. R. R. Co.*, 18 Ill. 88; *Eakright v. R. R. Co.*, 13 Ind. 404; *Wilson v. R. R. Co.*, 33

Ga. 466; *Grubbs v. Mahoning Nav. Co.*, 14 Pa. St. 302. Unless notice of assessments and calls is required by the charter, it is not an indispensable requisite of a suit to collect the stock subscriptions: *Eppes v. R. R. Co.*, 35 Ala. 33; *Wilson v. R. R. Co.*, 33 Ga. 466.

§ 449. Liability of Subscriber after Abandonment of Enterprise.—Where the object of the corporation is abandoned, no further payments can be called for from the subscriber,¹ except for the purpose of paying the debts and winding up the organization.² If a corporation does not commence *bona fide* the undertaking for which it was incorporated, within the time prescribed in the act of incorporation, it can maintain no action against subscribers who do not assent thereto.³ Where no call is made for a subscription to stock in a railroad company until after more than six years from the time of subscription, the law will presume that the company meant to abandon the enterprise, and will not enforce recovery.⁴ If a corporation chartered to construct and carry on the business of a railroad sells the road, without authority of law, to another company, it cannot collect unpaid subscriptions of stock from subscribers who did not consent to the sale.⁵

ILLUSTRATIONS.—A subscription to the stock of a hotel company, whose charter required completion of the hotel within a prescribed time, otherwise the franchise to be null and void, *held*, not released by failure to complete the hotel within such time: *Union Hotel Co. v. Hersee*, 79 N. Y. 454.

§ 450. Subscriptions upon Conditions Precedent.—A subscription to stock may be made upon a condition to be performed, and when so, the subscriber does not become a member of the company until the condition is performed.⁶ Thus a subscription may be made upon the

¹ *McCully v. R. R. Co.*, 32 Pa. St. 32.

² *Phoenix Co. v. Badger*, 67 N. Y. 294; *McMillan v. R. R. Co.*, 15 B. Mon. 218; 61 Am. Dec. 181; *Smith v. Gower*, 2 Duvall, 17; *Hardy v. Merriwether*, 14 Ind. 203.

³ *McCully v. R. R. Co.*, 32 Pa. St. 25.

⁴ *Pittsburgh etc. R. R. Co. v. Byers*, 32 Pa. St. 22.

⁵ *South Georgia etc. R. R. Co. v. Ayres*, 56 Ga. 230.

⁶ *Ticonic Water Co. v. Lang*, 63

Me. 480; *Chase v. R. R. Co.*, 38 Ill. 218; *Evansville etc. R. R. Co. v. Shearer*, 10 Ind. 246; *Goff v. Winchester College*, 6 Bush, 443; *Chamberlain v. R. R. Co.*, 15 Ohio St. 225; *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337; *Keller v. Johnson*, 11 Ind. 337; 71 Am. Dec. 355. A conditional disposition of stock may be made by the president and directors, and where subscribers agree to take stock upon condition

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condition that the company shall not be organized or do business until all or a certain amount of the stock shall be subscribed for. In such a case the subscription is not collectable until the required amount of stock has been taken;¹ so of a subscription conditioned that a railroad shall be located on a certain line or within a certain distance of a particular place.² Where stock in a corporation is subscribed on condition that the citizens of certain towns shall take a certain amount, no assessment can be made until the condition is complied with.³ A precedent condition that five dollars per share shall be paid by subscribers is not satisfied by a subscriber giving a note for his subscription.⁴

The subscriber cannot show in defense that some of the persons who have subscribed to make up the requisite amount are not responsible,⁵ or that a formal subscription was not made, provided the requisite amount was raised.⁶ Where a subscription to the funds of a college is made upon the condition that a certain sum shall be raised, the liability of the subscriber is fixed when that sum is

that the road shall be so located as to make a designated town a point, they become unconditional stockholders when the road is thus located: *McMillan v. R. R. Co.*, 15 B. Mon. 218; 61 Am. Dec. 181.

¹ *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318; *Cass v. R. R. Co.*, 80 Pa. St. 31; *Brewers' Co. v. Burger*, 17 N. Y. Sup. Ct. 56; *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 587; *Ridgefield etc. R. R. Co. v. Brush*, 43 Conn. 86; *Penobscot etc. R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Cabot etc. Bridge v. Chapin*, 6 Cush. 50.

² *Chapman v. R. R. Co.*, 6 Ohio St. 119; *Evansville etc. R. R. Co. v. Shearer*, 10 Ind. 244; *O'Neal v. King*, 3 Jones, 517; *Jewett v. R. R. Co.*, 10 Ind. 539; *North Missouri R. R. Co. v. Winkler*, 29 Mo. 318; *Martin v. R. R. Co.*, 8 Fla. 370; 73 Am. Dec. 713; *New Albany R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337; *Rhey v. R. R. Co.*, 27 Pa. St. 261; *Cumberland etc. R. R.*

Co. v. Baab, 9 Watts, 458; 36 Am. Dec. 132; *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385. In an action against a delinquent subscriber for stock, the defendant may prove that before he subscribed for any stock the president and one of the directors represented to him that the road would be so located as to run near or through his plantation; that he thereupon subscribed for stock in the company; and that the road was not located according to said representations: *Rives v. Plank Road Co.*, 30 Ala. 92. A subscription to a road is subject to the power of the legislature to change its location: *Irvin v. Turnpike Co.*, 2 Penr. & W. 466; 23 Am. Dec. 53.

³ *Ticonic Water Power Co. v. Lang*, 63 Me. 480.

⁴ *Boyd v. R. R. Co.*, 90 Pa. St. 169.

⁵ *Penobscot etc. R. R. Co. v. White*, 41 Me. 512.

⁶ *Springfield R. R. Co. v. Sleeper*, 121 Mass. 29.

raised; and a subsequent misapplication of the funds will not relieve him.¹ When it is a condition precedent in a contract for the subscription to the capital stock of a corporation that other stock, to a given amount, shall have been taken, that condition is waived by the conduct of the parties in paying the first installment on the subscription, voting the whole stock at an election for officers, and acting as officers in the corporation.² In an action to recover the whole amount of a subscription payable in installments, the company may recover an installment payable without any proviso or conditions, though it should fail in proving the right to the other installments.³

ILLUSTRATIONS.—A bridge company rebuilt its bridge across a river, at a point one mile from its former location, without the assent of one who subscribed one hundred dollars to the rebuilding at the old site. *Held*, that he was not liable upon the subscription: *Fremont Ferry etc. Co. v. Fuhrman*, 8 Neb. 99. A subscribed in aid of a railroad to be built, the company in consideration of the subscriptions agreeing to deposit collaterals to secure them. After A had paid some installments of his subscription, the company made such a disposition of the collaterals as to put them beyond the control of the subscribers in the manner originally contemplated. *Held*, that A was released from his obligations: *Reusens v. Mexican Nat. Construction Co.*, 22 Fed. Rep. 522. A stock subscription was on condition that the road be located through A. Upon representations that the company was about so to locate it, notes were given for the stock. *Held*, that the payment of the notes was precedent to building, and that the intent of the company at the time the note was given not so to locate was no defense, so long as they had not located elsewhere, nor otherwise disabled themselves from locating through A: *Keller v. Johnson*, 11 Ind. 337; 71 Am. Dec. 737. An agreement to take shares, etc., and that "as soon as the subscriptions to the amount of one hundred and fifty thousand dollars of the capital stock have been secured," etc., "the company shall be organized," *held*, not to be binding where an organization was made on only a one-hundred-and-thirty-thousand-dollar subscription: *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106. A contract of subscription to stock pro-

¹ *Franklin College v. Hurlburt*, 28 Ind. 344; *Topeka etc. Co. v. Cummings*, 3 Kan. 55.

² *Railroad Co. v. Hatch*, 1 Disn. 84.
³ *St. Louis etc. R. R. Co. v. Eakins*, 30 Iowa, 279.

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vided for the building of the A railroad according to the survey made by the B railroad, the original route running within five hundred feet of M.'s mill. This route was changed so as to make it run twelve hundred feet from the mill. In suit against M. for the amount of his subscription, *held*, that he might show that this alteration in the route was as to him and his interest a material variation: *Moore v. R. R. Co.*, 94 Pa. St. 324. The action was for a subscription to railroad stock, which contained the condition that plaintiff would "put the said road under contract in one year from September 1, 1858," "with the condition to be built" to a certain town "within twenty months from the time of letting such contract." *Held*, that this was a condition precedent, and that a completion of the road upon the first day of September, 1858, without letting the contract within the time limited, or with the conditions stipulated, was not a sufficient compliance therewith to entitle plaintiff to recover: *Burlington etc. R. R. Co. v. Boestler*, 15 Iowa, 555. A subscription to the stock of a hotel company was made on condition that "the sum of two hundred thousand dollars be subscribed by the citizens of Buffalo." *Held*, 1. That payment on each subscription was a ratification thereof; 2. That a subscriber whose domicile was in Batavia, but who was engaged in business in Buffalo, and spent nearly all his time there, was a citizen of Buffalo within the meaning of the condition; 3. That a subscription signed by B. Spencer, in the name of B. and S. M. Spencer, was within the condition, he being a resident of Buffalo, and liable on his individual subscription, in case there was no firm by that name, nor authority: *Union Hotel Co. v. Hersee*, 79 N. Y. 454; 35 Am. Rep. 536. The charter of a railroad company authorized the company to organize, and proceed to construct the road, when two hundred thousand dollars should be subscribed. The corporators made their subscriptions conditional upon the whole amount required for completion of the road being subscribed. *Held*, that this condition was not inoperative, as being repugnant to the provision of the charter: *Ridgefield etc. R. R. Co. v. Brush*, 43 Conn. 86. A subscription was upon condition that, "whenever a sum sufficient, in the judgment of the stockholders, shall be subscribed, there shall be a meeting of them called, and a permanent organization effected." *Held*, not binding upon subscribers until a permanent organization had been effected, with their consent, and an expression of opinion obtained from the stockholders as to the sufficiency of the amount subscribed to effect the object proposed: *Goff v. Winchester College*, 6 Bush, 443. The terms of a subscription were, that a certain percentage of the estimated cost of sections of a railroad should be subscribed for by responsible persons before the construction was commenced. *Held*, that if the subscriptions were obtained in

good faith, from persons apparently able to pay, the fact that they finally proved to be of less value will not render the proceedings illegal: *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654. A note was given for a subscription to a railroad, conditioned that it should not be payable until work should be commenced on the end of the same road south from Indianapolis; the note was given upon the representation of the agents of the company that such work had been commenced, when in fact it had not. *Held*, that the commencement of the work at the point named was a condition precedent to the right of the company to demand the subscription; and the note, having been obtained upon the false representation that this condition had been complied with, was void: *Taylor v. Fletcher*, 15 Ind. 80. A condition in a contract of subscription to the stock of a railroad company was that the road should be located and constructed along a designated route. *Held*, not a condition precedent, requiring the actual construction and completion of the road before payment could be required, but only that when the road was located and constructed it should occupy the route designated: *Miller v. R. R. Co.*, 40 Pa. St. 237; 80 Am. Dec. 570.

§ 451. Subscriptions upon Conditions—When Subscriber Held Unconditionally.—Where a subscriber acts as a member, or in any way waives the condition, it will be no defense for him to say that his subscription was upon a condition precedent, or upon special terms.¹ The giving of absolute notes for the amount of a subscription does not of itself amount to a waiver of the maker's right to have the road located as he had stipulated, before payment of the notes can be compelled.² Nor does a failure to notify the company of an intention to insist on the performance of the condition amount to a waiver.³ It is held in some cases that, under a charter authorizing absolute subscriptions for stock in a corporation for the construction of a public highway, subscriptions conditioned on the adoption of a particular locality or terminus

¹ Morawetz on Corporations, sec. 297; *Bavington v. R. R. Co.*, 34 Pa. St. 353; *Pittsburg etc. R. R. Co. v. Biggar*, 34 Pa. St. 455; *Lane v. Brainerd*, 30 Conn. 565.

² *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385. But see *O'Donald v. R. R. Co.*, 14 Ind. 259.

³ *R. R. Co. v. Boestler*, 15 Iowa, 555.

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are void as against public policy.¹ It has also been held that commissioners appointed to receive subscriptions are agents with limited powers, incapable of offering any other terms to a subscriber than those prescribed by the legislature, and therefore that conditions attached by them to subscriptions for stock not so authorized are nugatory.² A private agreement, that after passing the examination of the commissioners provided for by law, for the purpose of ascertaining the fact of the subscription of the proper amount of capital, it should be given up and a lesser one substituted, is a fraud upon the law, and the maker remains liable, though such note be surrendered and destroyed.³ A provision that seventy-five per cent of the cost of a railroad shall be subscribed by responsible persons before it can commence to construct its road will not invalidate assessments on stock subscribed, because some of the subscriptions necessary to make up that amount turn out to be worthless, if such subscriptions were obtained in good faith.⁴ Parol evidence is not admissible to prove a condition not contained in the written subscription.⁵

ILLUSTRATIONS. — A subscription was on condition that if the C. railroad should be permanently located and constructed through L. "we will pay the sum set opposite our names to M., as trustee, to be applied by him only toward paying the damages and expenses which shall be incurred in acquiring the right of way or lands therefor, and depot grounds in F. County." Held, not to render the completion of the road a condition precedent to the payment of the money: *Berryman v. Cincinnati Southern R'y Trustees*, 14 Bush, 755. Subscribers to the stock of a railroad company gave their notes for the amounts of sub-

¹ *Butternuts and O. T. Co. v. North*, 1 Hill, 518; *Cumberland V. R. R. Co. v. Baab*, 9 Watts, 458; 36 Am. Dec. 132; *Fort Edward etc. P. Co. v. Payne*, 15 N. Y. 583. But see *Racine etc. Bank v. Ayres*, 12 Wis. 512.

² *Bedford R. R. Co. v. Browser*, 48 Pa. St. 29; *Pittsburg etc. R. R. Co. v. Biggar*, 34 Pa. St. 455; *Bavington v. R. R. Co.*, 34 Pa. St. 358.

³ *Tuckerman v. Brown*, 33 N. Y. 297; 88 Am. Dec. 386.

⁴ *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654.

⁵ *Thigpen v. R. R. Co.*, 32 Miss. 348; *Madison etc. R. R. Co. v. Stevens*, 6 Ind. 379; *Cunningham v. R. R. Co.*, 2 Head, 23; *North Carolina R. R. Co. v. Leach*, 4 Jones, 340; *Johnson v. R. R. Co.*, 9 Fla. 299; *Kennebec etc. R. R. Co. v. Waters*, 34 Me. 369; *Roche v. Roanoke C. Seminary*, 56 Ind. 198; *Noble v. Callender*, 20 Ohio St. 199; *Stewards v. Town*, 49 Vt. 29.

scriptions, payable when the road should be completed, but were subsequently induced to take up these notes and give new ones, payable in four years, in order to enable the company to carry out a contract for the completion of the road, and upon a confident but honest expression of opinion by its officers that if they would do so the road would be completed under such contract in less than four years. *Held*, that the subscribers were liable on the new notes, although the contract was abandoned before anything had been done under it, and the road never completed: *Four Mile Valley R. R. Co. v. Bailey*, 18 Ohio St. 208. The charter of a railroad corporation provided that a certain amount of capital stock should be subscribed before any assessments should be made. The number of shares requisite to make up such amount was subscribed, but the subscription contained a condition that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the railroad should be put in operation. *Held*, that such condition did not avoid the subscription: *Rutland etc. R. R. Co. v. Thrall*, 35 Vt. 536. The defendant subscribed for a share of stock in a telegraph line, there being annexed to the subscription one stipulation, among others, by which a committee was appointed "to see that the stipulations are and will be complied with before the subscriptions are paid." *Held*, that the action of the committee was not a condition precedent to a recovery of the price of the stock: *Shaffner v. Jeffries*, 18 Mo. 512. Certificates of stock in a corporation were issued and paid for under a contract in writing agreeing to subscribe therefor, and reserving to the subscriber the right to withdraw the money paid, and to have the subscription canceled. *Held*, that the contract was void as to subsequent subscribers: *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199. A subscribed for stock of a corporation, but made his subscription payable upon certain conditions. He afterwards gave a note for the amount of his subscription. In the note no mention was made of the conditions. *Held*, that they were thereby waived: *Slipher v. Earhart*, 83 Ind. 173. A company was chartered for the purpose of buying, selling, and leasing property, and also as a homestead or building association; and at the time of the entry of defendant's subscription, it was engaged in the prosecution of its business, and the subscriber knew at the time that its whole capital stock had not been taken. *Held*, that it might be inferred that defendant's subscription was not made upon the condition that the company was not to organize until the whole number of shares had been taken: *Musgrave v. Morrison*, 54 Md. 161. A promissory note, payable to the treasurer of the Chicago and Canada Southern Railway Company, was made "in consideration of the construction of" the railroad through or within

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half a mile of the village of Dundee, "within three years after this date, and the building of passenger and freight depot" at Dundee, payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the company named Chicago as one of the termini. The track was laid through Dundee, and the depot put up; but instead of extending the road to Chicago, it was connected with other routes at the point beyond Dundee, so as to form a through line. *Held*, that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built, regardless of the failure to extend it to Chicago within three years, as stipulated: *Stowell v. Stowell*, 45 Mich. 364. Several persons signed a paper reciting that as A had proposed to build a railroad from B to C, in consideration of the right of way and three thousand dollars a mile local subscription, they promised to give their notes to the B and C railroad company for the amounts set opposite their names. The company was not then organized, nor the line of the road fixed. In a suit on one of the subscriptions, *held*, that the plaintiff might show that, owing to the high lands near the city, it had not been contemplated by the parties that the road would be built to the corporate limits of B, but that the line of a previously constructed road was to be used for some distance, and that the nature of the ground might be shown as the reason why a particular route could not be chosen: *Detroit etc. R. R. Co. v. Starnes*, 38 Mich. 698.

§ 452. Subscriptions Obtained by Fraud — When Voidable.—Subscriptions for shares obtained by fraud are not binding on the subscriber, but are voidable at his election.¹ In a suit by a corporation against a stockholder, the latter may set off any sum fraudulently obtained from him as a subscription, unless there are debts of the corporation incurred since his subscription equal to said sum

¹ *Vreeland v. Stone Co.*, 29 N. J. Eq. 190; *Upton v. Englehart*, 3 Dill. 499; *Central R. R. Co. v. Kisch*, L. R. 2 H. L. 99. Where one subscribes to the capital stock of a foreign corporation, induced by the fraudulent representations of an agent, *held*, that upon discovery of the fraud, he might rescind his contract and recover any payments he had made to the corporation: *Grangers' Ins. Co. v. Turner*, 61 Ga. 561. The representations of

an agent may be given in evidence to show the fraud by which subscriptions to the stock of a corporation were obtained, if such representations were a part of a scheme of fraud, participated in by the officers of the corporation authorized to manage its affairs, or if the representations were such as the subscriber might reasonably presume the agent had authority to make: *Custar v. Gas etc. Co.*, 63 Pa. St. 381.

or greater.¹ Says Mr. Morawetz:² "The question whether or not the contract of a share-holder be voidable for false representations must necessarily depend in each case upon the peculiar circumstances surrounding it. But it may be stated as a general rule that any fraudulent representation with regard to the financial state of a company,³ or its arrangements for carrying out its enterprise,⁴ or with regard to any other fact which can reasonably be supposed to have been material in inducing a person to become a share-holder, will enable the latter to avoid his contract. If a person is induced to take shares by a false representation that another person has become a share-holder,⁵ or that certain persons have agreed to act as directors of the company,⁶ this will be a ground for avoiding the subscription; but it must appear in such case that the subscriber relied upon the statement, and was induced thereby to take the shares."⁷ But a person who has been induced to subscribe by fraud cannot recover the amount paid until the claims of creditors have been satisfied.⁸

ILLUSTRATIONS.—The defendant, sued on his subscription for stock in a turnpike company, answered that he was illiterate and could not read, and did not hear the articles of association read; but a party to them, interested in obtaining subscriptions, induced him to subscribe, by his false representation that the articles did not require a payment of subscription until twenty thousand dollars had been subscribed. *Held*, that these averments set up a sufficient ground of defense: *Wert v. Crawfordsville etc. Co.*, 19 Ind. 242. The governor of the state was authorized to subscribe in behalf of the state for a certain amount of stock in an incorporated turnpike company, when ten per cent of the stock of individual subscribers should be paid in. *Held*, that the subscription of the governor for such

¹ *Hamilton v. Grangers' Life and Health Ins. Co.*, 67 Ga. 145.

² *Corporations*, sec. 309.

³ *Water Valley Mfg. Co. v. Leaman*, 53 Miss. 655; *Waldo v. R. R. Co.*, 14 Wis. 575; *Milendy v. Kean*, 89 Ill. 395; *Bradley v. Poole*, 98 Mass. 169; 93 Am. Dec. 144.

⁴ *Vreeland v. Stone Co.*, 29 N. J. Eq. 190.

⁵ *Henderson v. Lacon*, L. R. 5 Eq. 249.

⁶ *Blake's Case*, 34 Beav. 637.

⁷ *Walker v. R. R. Co.*, 34 Miss. 246.

⁸ *Turner v. Ins. Co.*, 65 Ga. 649; 38 Am. Rep. 801.

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stock, on the false representation of the directors that the ten per cent had been paid in, was not binding on the state: *State v. Jefferson Turnpike Co.*, 3 Humph. 305.

§ 453. **When not Voidable.**—The false representation which will avoid a subscription must not be a representation as to a matter of law;¹ or of opinion;² or of the construction or effect of the charter;³ or be in the nature of a future promise.⁴ So the false representation must have been of a material matter;⁵ and the fraud must not be the fault of the subscriber himself;⁶ and the false representations must have been made fraudulently;⁷ and must have been believed or relied on by the subscriber.⁸ A discharge from a stock subscription on the ground of fraud cannot be obtained by one who was himself a party to the fraud.⁹ A stockholder cannot maintain an action to recover back his subscription on the mere ground of the failure of the company to acquire land mentioned in the prospectus. To warrant such an action, he must show some misrepresentation or fraud, or such an entire failure in the objects and purposes of the company as amounts to a virtual dissolution.¹⁰ A contract to purchase shares, induced by fraudulent representations or concealment, is not void, but only voidable; that is, it is valid until disaffirmed. And where the rights of creditors are concerned, the contract must be repudiated promptly on discovering the fraud, or it will be held binding as to them.¹¹ Where by the fraud of an agent of a company a person is induced to subscribe for stock therein, as between the company and the person thus induced to take the stock, the same prin-

¹ *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385.

² *Bish v. Bradford*, 17 Ind. 490.

³ *Ellison v. R. R. Co.*, 36 Miss. 572; *New Albany R. R. Co. v. Fields*, 10 Ind. 187.

⁴ *New Albany R. R. Co. v. Fields*, 10 Ind. 187.

⁵ *Pulsford v. Richards*, 17 Beav. 96; *Andrews v. R. R. Co.*, 14 Ind. 169.

⁶ *Hallows v. Fernie*, L. R. 3 Ch. 477.

⁷ *Morawetz on Corporations*, sec. 308.

⁸ *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385.

⁹ *Southern Plank Road Co. v. Hixon*, 5 Ind. 166.

¹⁰ *Kelsey v. Northern Light Oil Co.*, 54 Barb. 111.

¹¹ *Farrar v. Walker*, 3 Dill. 506.

ciples apply as would apply to like contracts between individuals. The company cannot retain any benefit which it has obtained through the fraud of its agent, and it is ordinarily no answer to the claim of a person to be relieved against a contract procured from him by fraud to show that by more inquiry he could have learned the truth.¹ Representations by the agent of a corporation as to the non-assessibility of its stock, beyond a certain percentage of its value, constitute no defense to an action against the holder of the stock to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations.²

The following have been held not sufficient to avoid the contract: Representations by the soliciting agent that "the company had stock enough to complete the road, and would do it in two years";³ a false representation by the soliciting agent of a railroad company, that the contractors could construct and equip it without any advance from the company;⁴ fraudulent representations by an officer of a corporation at a public meeting, in presence of a majority of the directors, but not in pursuance of any authority from their board;⁵ false representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route, as to the intended location, and the time within which it will be completed to a particular place, unless known by the agent to be false, and made by him with intent to deceive;⁶ false representations that the subscriber will not be called on to pay anything until the road is laid out in his county;⁷ representations made by officers of a corporation, to one dealing with it, that the

¹ *Upton v. Englehart*, 3 Dill. 496.

² *Upton v. Tribilcock*, 91 U. S. 45.

³ *Hardy v. Merriweather*, 14 Ind. 203.

⁴ *Andrews v. R. R. Co.*, 14 Ind. 169.

⁵ *Buffalo etc. R. R. Co. v. Dudley*,
14 N. Y. 336.

⁶ *Montgomery Southern R. R. Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 60.

⁷ *Clem v. R. R. Co.*, 9 Ind. 488; 68 Am. Dec. 653.

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corporation is a legally organized body, when in fact it was irregularly organized, when it appears that articles of incorporation had actually been drawn up and signed, and officers of the organization elected, and that the officers making the representations did not know that the corporation was illegal and unauthorized;¹ representations to subscribers to stock in railroad company, by the commissioners appointed to receive stock subscriptions, as to the future location of the road, when the commissioners by the terms of the charter have nothing to do with the location.²

ILLUSTRATIONS. — A false representation was made by an agent of a railroad, soliciting stock subscriptions, that the company already had enough subscriptions to finish the road in a specified time, and sought others from persons living on the line of the road only as evidence of friendliness. *Held*, to bear merely on matters of expectation and opinion, and not to suffice to avoid the subscription: *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. R. R. Co.*, 18 Ind. 68; *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385. Stockholders of an insurance company paid part of their subscription in cash, and according to the charter gave notes for the rest. *Held*, that it was no defense to a creditor's bill to collect the notes that the agent who obtained the subscription misrepresented the condition of the company: *Ogilvie v. Knox Ins. Co.*, 22 How. 380. A bank was fraudulently organized under a lawful charter, by parties who induced defendant to subscribe for a portion of the stock, representing to him that his subscription would be merely nominal, and that he would not be required to pay for the stock. The bank was organized, issued a large amount of bills, and soon after failed, and went into the hands of receivers for the benefit of its creditors. In a suit brought by the receivers in the name of the bank against the defendant, upon his subscription, *held*, that he could not avail himself, in defense of the fraudulent character of the bank, of the misrepresentations under which he had been induced to subscribe for the stock. He with his associates constituted the bank, and he therefore shared with them in the fraud of the bank on the public: *Litchfield Bank v. Church*, 29 Conn. 137.

¹ *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621.

² *Wight v. R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522.

§ 454. **Laches of Subscriber.**—But a person who was induced by fraud to purchase shares cannot avoid his contract if after notice of the fraud he derives any benefit from the shares, or acts as a stockholder.¹ Where a subscriber to the capital stock of a railroad company sought to avoid his subscription on the ground of the false representations of the company's soliciting agent, as to the persons who had subscribed, and seven years had elapsed after the subscription before suit was brought, and no excuse was shown for delay, it was held that the presumption was against the subscriber's right to avail himself of these facts until he had accounted for his delay.²

§ 455. **Stockholder cannot Rescind Contract.**—As a general rule, a stockholder has no power to rescind his contract at will, and to dissolve his connection with the corporation.³ A subscriber for stock cannot withdraw his subscription without the consent of his co-subscribers.⁴ So a subscriber to the capital stock of a private corporation, in process of organization, can neither withdraw nor be released without the consent of all the subscribers. The board of directors has no general power in that matter.⁵ The promise of each subscriber to the joint capital stock of a company is a good consideration for the promise of the other subscribers, the object of the enterprise being the advancement of the private interests of all; and after the act of incorporation has been obtained, none can withdraw without the consent of the others, whether the work has been undertaken or not.⁶ One who is appointed to receive subscriptions to corporate stock at a

¹ *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Chubb v. Upton*, 95 U. S. 665; *Parks v. R. R. Co.*, 23 Ind. 567; *Ashley's Case*, L. R. 9 Eq. 363; *City Bank v. Bartlett*, 71 Ga. 797.

² *Dynes v. Shaffer*, 19 Ind. 165.

³ *United Society v. Eagle Bank*, 7 Conn. 457; *Bishop's Fund v. Eagle Bank*, 7 Conn. 476, *Bordentown T. Co.*

v. Imlay, 4 N. J. L. 285; *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. 451.

⁴ *Johnson v. Wabash etc. Co.*, 16 Ind. 389.

⁵ *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

⁶ *Twin Creek and Colemansville Turnpike Road Co. v. Lancaster*, 79 Ky. 552.

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meeting of the corporators, and who thereupon subscribes himself, and takes the subscriptions of others, cannot afterward release himself by erasing his name from the subscription paper before turning it over to the corporation.¹ A plea by a subscriber to the stock of an incorporated company, that he had been released from his liability on his subscription by a resolution of the board of directors of the company, must aver that there was a consideration to support the resolution, and also that the company, at the time of the averred release, was not in debt, as the corporation could not make such release to the injury of its creditors.² Says Mr. Morawetz:³ "A stockholder in a corporation can escape from the obligation of his contract only by one of the following methods: 1. By a transfer of his shares, and an acceptance of the transfer on the part of the corporation, thus affecting a complete novation; 2. By a forfeiture and sale under authority expressly conferred on the company by its charter; 3. By expiration of the charter according to its own limitations; 4. By forfeiture of the franchises and dissolution of the company at the suit of the state; 5. By act of the majority in winding up the business of the company and surrendering its charter; 6. By act of the share-holder where permission to withdraw is expressly conferred by the charter; 7. By unanimous consent of the members of the company." The requirement of the charter that a certain per cent of cost shall be subscribed before a railroad shall commence the construction of any section of its road does not affect the organization of the company, and non-compliance therewith will not defeat an action to recover stock assessments against a subscriber.⁴ A subscription to capital stock, by giving bonds and mortgage in payment in lieu of coin, and issuance of a

¹ Cheraw etc. R. R. Co. v. White,
10 S. C. 155.

² Zirkel v. Joliet Opera House Co.,
79 Ill. 334.

³ Morawetz on Corporations, sec.
311.

⁴ Penobscot R. R. Co. v. White, 41
Me. 512; 66 Am. Dec. 257.

certificate of stock thereon, creates a liability on such bonds and mortgage; and if upon them, as a portion of its capital, the corporation embarks in business, though in violation of the express provision of the charter that the capital stock must all be paid in before so doing, the obligor may defend an action on such securities, and therein contest their validity, but he cannot invoke the aid of a court of equity to interfere with and restrain suits brought upon the bonds in a court of law for the purpose of aiding him to avoid their payment.¹ An original subscriber to stock of a railroad company cannot, at law, interpose as a defense to an action against him for calls upon his stock, that said company has accepted subsequent legislative changes of its charter, when such changes consist only of an increase of corporate powers, or of a different organization of the corporate body, leaving the corporation with lawful power to execute what may be considered as substantially the original work.²

ILLUSTRATIONS. — The by-laws of a stock company provided that a member might withdraw on giving a certain notice, the refunding not to exceed one eighth of the capital paid in. *Held*, that after such notice, etc., the person no longer occupied the position of a member of the corporation, except for the purpose of receiving his money, but the relation of debtor and creditor supervened between him and the corporation. As such creditor, he would be entitled to demand the money advanced on his share to the company, not a dividend upon the funds of the corporation: *Gaehele's Piano Mfg. Co. v. Berg*, 45 Md. 113.

§ 456. Violation of Charter No Ground for Rescission.

—That the charter has been violated by the corporation is no ground for rescission of contract; the stockholder cannot set that up as a defense to performing his contract.³

¹ *Yard v. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467.

² *Pacific R. R. Co. v. Hughes*, 22 Mo. 291; 64 Am. Dec. 265.

³ *Mississippi R. R. Co. v. Cross*, 20 Ark. 443; *Hannibal Plank Road v. Menefee*, 25 Mo. 547; *East etc. Hotel Co. v. West*, 13 La. Ann. 545. Where

a corporation, organized by the permission of the chancery court, sues a subscriber to its stock upon his subscription, the latter, who has dealt with it as a corporation, cannot deny the validity of the proceeding by which the name of the corporation was changed, although the subscrip-

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Illegality in the election of directors is no defense to an action on a stock subscription.¹

ILLUSTRATIONS.—The defendants gave their note to a bank in payment of stock, and became stockholders. *Held*, that they could not claim, as a defense to an action on the note that the bank improperly received the note in payment of the stock, instead of requiring the defendants to pay the money: *Finnell v. Sandford*, 17 B. Mon. 748.

§ 457. Forfeiture of Shares for Non-payment of Assessments.—The remedy against a stockholder for failure to pay assessments is an action at law in the name of the corporation. The latter has no lien on the shares of stock, and cannot forfeit them.² A statute giving a corporation power “to make by-laws not inconsistent with any existing law, for the management of its property, and the regulations of its affairs, and the transfer of stock,” does not authorize a by-law forfeiting stock for non-payment of calls.³ The power to forfeit and sell shares for failure to pay assessments is, however, frequently given in the charter, and may then be exercised.⁴ But in exercising this power, the formalities required by the charter must be strictly observed.⁵ When a corporation has provided, under the terms of its charter, for forfeiting stock partially paid up, this dissolves the connection of the stockholders, when shares are forfeited by the corporation, and a creditor cannot charge them with the amount unpaid.⁶ Where the share of a defaulting stockholder in a railroad company is by the charter made “liable to forfeiture, and the company may

tion recognizes the old name of the corporation: *Greeneville etc. R. R. Co. v. Johnson*, 8 Baxt. 332.

¹ *Johnson v. R. R. Co.*, 11 Ind. 280.

² *Williams v. Lowe*, 4 Neb. 398; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429.

³ *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429.

⁴ *Morawetz on Corporations*, sec. 317.

⁵ *Germantown R. R. Co. v. Fidler*, 60 Pa. St. 124; 100 Am. Dec. 546; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Hughes v. Antietam Mfg. Co.*, 34 Md. 317; *Eastern Plank Road v. Vaughan*, 20 Barb. 157; *Mitchell v. Vermont Copper Co.*, 40 N. Y. Sup. Ct. 406; *York etc. R. R. Co. v. Ritchie*, 40 Me. 425.

⁶ *Allen v. R. R. Co.*, 11 Ala. 437.

declare the same forfeited and vested in the company," the option to forfeit is with the company, and not with the stockholder.¹ A general resolution of a railroad company forfeiting stock for non-payment of installments must declare to the stockholder that they claim to forfeit his specific stock, otherwise it will not be valid.² A corporation without power to declare stock forfeited for non-payment of subscriptions may, after failing to collect the full amount by suit, collect the rest by a sale of the stock.³ A corporation will not be permitted to enforce payment of stock for which its agents obtained subscriptions, on conditions which it refuses to comply with.⁴ Under a provision in a charter providing that if any subscriber shall neglect to pay his assessments, the directors may order the treasurer to sell his shares at public auction, when the party makes an express promise to pay the assessments, he is answerable to the corporation upon such promise for all legal assessments, and may be compelled to its performance by an action at law before resorting to a sale of the shares. If, however, he only agrees to take a specified number of shares, without promising expressly to pay assessments, the shares must first be sold to pay the assessments, before an action at law can be maintained.⁵ A resolution of directors distributing shares of authorized capital stock remaining untaken at the time of incorporation among all the stockholders who are not in arrear on the shares already taken by them, and excluding those who are in arrear, is an unlawful imposition of a penalty on those in arrear, and a

¹ Railroad Co. v. Rodriguez, 10 Rich. 278.

² Johnson v. R. R. Co., 40 How. Pr. 193.

³ Chase v. R. R. Co., 5 Lea, 415. If at the time a thirteenth and a fourteenth assessment were levied the corporation had no funds, and said assessments were needed for legitimate purposes, sales of delinquent stock made

thereunder held not void, for the reason that the trustees had previously misappropriated the corporation funds: Marshall v. Golden Fleece etc. Mining Co., 16 Nev. 158.

⁴ Turnpike Co. v. Churchill, 6 T. B. Mon. 427.

⁵ New Hampshire Cent. R. R. Co. v. Johnson, 30 N. H. 390; 64 Am. Dec. 300.

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violation of the equal rights of a corporator who was ready and offered to take his proportion of the new shares.¹

But the power to forfeit is cumulative, and does not take away the common-law remedy of an action against the defaulting stockholder.² No notice is necessary before suit brought upon a subscription after the contract of subscription becomes complete and the subscriber becomes a stockholder.³ No tender of the certificate of stock is necessary before suit is brought upon the subscription. Certificates of stock are simply evidence of stock, and are not indispensable.⁴ It has been held that the stockholder has an equity of redemption in the forfeited shares.⁵

ILLUSTRATIONS.—The by-law of a corporation provided for notice to be given for sales of shares for non-payment of assessments, by advertisement, designating the time and place thereof, and the shares to be sold. *Held*, that any description sufficing to show clearly what shares were intended to be the subject of sale is sufficient: *York etc. R. R. Co. v. Pratt*, 40 Me. 447. A railroad charter authorized the sale of the stock of delinquent subscribers, but required notice of the assessment thirty days before the order of the directors for the sale of the shares, that the sale should be by public auction at the post-office in C., and that the treasurer should give to the subscriber a notice in hand, signed by the treasurer, or by a director in his behalf. *Held*, 1. That a notice of the assessment thirty days before the sale was insufficient; 2. That the sale must be by public auction at the post-office in C.; 3. That a notice to the subscriber in hand not

¹ *Reese v. Bank*, 31 Pa. St. 78; 72 Am. Dec. 727.

² *Hughes v. Antietam Mfg. Co.*, 34 Md. 317; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 401; *New Hampshire R. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300; *Klein v. R. R. Co.*, 13 Ill. 514; *Northern R. R. Co. v. Miller*, 10 Barb. 260; *Worcester Turnpike Co. v. Willard*, 5 Mass. 80; 4 Am. Dec. 39; *Instone v. Bridge Co.*, 2 Bibb, 576; 5 Am. Dec. 638; *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217; 6 Am. Dec. 273; *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec.

344; *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Kirksey v. Florida etc. Co.*, 7 Fla. 23; 68 Am. Dec. 426. Where a stockholder has forfeited his stock, no decree can be rendered against him for any liability upon it: *Lexington R. R. Co. v. Bridges*, 7 B. Mon. 556; 46 Am. Dec. 528.

³ *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337.

⁴ *New Albany etc. R. R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337.

⁵ *Walker v. Ogden*, 1 Biss. 287.

signed by the treasurer or a director was insufficient: *Lewey's etc. R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *York etc. R. R. Co. v. Ritchie*, 40 Me. 425. The charter of a railroad company provided that if any stockholder should omit for the space of six months to pay any installments on his shares which might be called for, the managers of the company might declare such shares forfeited. The defendant, who was the owner of a certain number of shares in the company, paid two installments on his shares when called for. The company then made a general assignment for the benefit of its creditors, and a call for a third installment was made by the managers, without either the approval or disapproval of the assignee. *Held*, that the proper time according to the charter having elapsed, the managers had the authority to declare the defendant's shares forfeited, and a court of equity would not grant relief: *Germantown etc. R. R. Co. v. Fittler*, 60 Pa. St. 124; 100 Am. Dec. 546.

§ 458. **Right to Transfer Shares.**—A share-holder in an ordinary trading or business corporation may transfer his shares at will, unless restricted by the charter or general law.¹ But the right to transfer ceases at the dissolution of the corporation.² A corporation may maintain an action against a person who presents a forged power of attorney to transfer stock, upon the faith of which the corporation issues to such person a new certificate of stock, although such person acted in good faith.³ The assignees of stock certificates in a corporation are not share-holders by virtue of the assignment, when a transfer upon the books of the company is required, and in a suit by such assignees against the corporation, evidence is admissible to show that the assignment was merely by way of pledge.⁴

ILLUSTRATIONS. — Articles of a corporation limited each stockholder to an ownership of one hundred shares. *Held*, that as this was not required by the laws of the state, it was a mere voluntary proposal, and that a transfer of more than that number of shares to one share-holder was valid: *O'Brien v. Cummings*, 13 Mo. App. 197.

¹ Morawetz on Corporations, sec. 321; *Stebbins v. Ins. Co.*, 3 Paige, 350.

² *James v. Woodruff*, 10 Paige, 540; 2 Denio, 574.

³ *Boston etc. R. R. Co. v. Richardson*, 135 Mass. 473.

⁴ *Becher v. Wells Flouring Mill Co.*, 1 McCrary, 62.

§ 459. When Stockholder Remains Liable notwithstanding Transfer.—The transfer of shares to an insolvent, or to a person unable to perform the obligations of a stockholder, is not allowed.¹ A transfer made to an infant, or other person incapable of contracting, leaves the transferrer liable as though no transfer had been made.² But the infant transferee may, after attaining his majority, as in case of any other contract made by him, ratify the contract, in which case he will succeed to the liability of the transferrer.³ Transfers to insolvents, or other persons incapable of responding to creditors, made while the company is in failing circumstances, or insolvent, with the intent on the part of the transferrer of escaping liability as holder of the shares, are, in the view of the American courts, void, because in fraud of the right of the company; and the transferrer remains liable as though no such transfer had been made.⁴ Transfers to the company itself of unpaid shares are in general void, and leave the transferrer liable as a share-holder.⁵ But valid forfeitures of shares for non-payment of calls made by the directors while the company is a going concern, and not with a view of enabling the stockholder to escape liability, are not void; such forfeitures terminate fully the liability of the stockholder, so that neither the corporation⁶ nor its credi-

¹ *Chouteau Spring v. Harris*, 20 Mo. 382; *Muskingum Tp. Co. v. Ward*, 13 Ohio, 120; 42 Am. Dec. 191.

² *Capper's Case*, L. R. 3 Ch. 458; *Roman v. Fry*, 5 J. J. Marsh. 634; *Castleman v. Holmes*, 4 J. J. Marsh. 7.

³ *Lumsden's Case*, L. R. 4 Ch. 31; *Ebbett's Case*, L. R. 5 Ch. 302; *Baker's Case*, L. R. 7 Ch. 115; *Maguire's Case*, 3 De Gex & S. 31; *Mitchell's Case*, L. R. 9 Eq. 363; *Wilson's Case*, L. R. 8 Eq. 240.

⁴ *Nathan v. Whitlock*, 3 Edw. Ch. 215; affirmed on appeal, 9 Paige, 152; *Provident Savings Inst. v. Jackson Place Skating Rink*, 52 Mo. 557; *McClaren v. Franciscus*, 43 Mo. 452; *Miller v. Great Republic Ins. Co.*, 50

Mo. 55; *Marcy v. Clark*, 17 Mass. 330; *Veiller v. Brown*, 18 Hun, 571.

⁵ *Zulueta's Claim*, L. R. 5 Ch. 444; reversing L. R. 9 Eq. 270; Ex parte *Credit Foncier and Mobilier of England*, L. R. 7 Ch. 161; *Morgan's Case*, 1 De Gex & S. 750; 1 Maen. & G. 225; 1 Hall & T. 320; *Matter of Reciprocity Bank*, 22 N. Y. 18; *Johnson v. Lafflin*, 17 Alb. L. J. 146; *Thompson's Nat. Bank Cases*, 331; 6 Cent. L. J. 124; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *contra*, *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *Hartridge v. Rockwell*, R. M. Charl. 260; *Gillet v. Moody*, 3 N. Y. 479.

⁶ *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330; overruling 21 Wend. 273, and

tors¹ can afterwards maintain an action against him for any unpaid installments due on account of such shares.

§ 460. Effect of Transfer of Shares. The transfer of shares of stock in a corporation works a complete novation. The transferrer ceases to be a member of the corporation, and is discharged from all further liability.² The transferee takes his place, and becomes entitled to all the privileges of membership and all the future profits; and he likewise assumes all the obligations of the former stockholder.³ The transferee of stock in an incorporated company is not liable for an unpaid subscription thereon.⁴ One who sells shares of the capital stock of a corporation before the issue of certificates, agreeing to give the buyer a certificate when he gets it, is not bound, as between the buyer and himself, to pay an assessment laid upon the shares subsequently to the sale, and before the issue of certificates.⁵ On a sale of shares of corporate stock there is no implied warranty that the stock has not been fraudulently issued by the officers in excess of the amount authorized by the charter.⁶ One cannot, by purchase, acquire a title to a seat in the stock exchange, freed from the debts of a former owner to members of the board.⁷

2 Hill, 127; Andover etc. Turnpike Co. v. Gould, 6 Mass. 40; 4 Am. Dec. 80; Franklin Glass Co. v. White, 14 Mass. 286; Chester Glass Co. v. Dewey, 16 Mass. 94; 8 Am. Dec. 128; Ripley v. Sampson, 10 Pick. 371; Cutler v. Middlesex Factory, 14 Pick. 483; Mechanics' Foundry and Machine Co. v. Hall, 121 Mass. 272; Ashton v. Burbank, 2 Dill. 435; King's Case, L. R. 2 Ch. 714, 719, 731; Knight's Case, L. R. 2 Ch. 321.

¹ Allen v. R. R. Co., 11 Ala. 450; Mills v. Stewart, 41 N. Y. 384 (Hunt, C. J., and Woodruff, J., dissenting); affirming 62 Barb. 444; Macaulay v. Robinson, 18 La. Ann. 619.

² Isham v. Buckingham, 49 N. Y. 216; Cowles v. Cromwell, 25 Barb. 413; Cole v. Ryan, 52 Barb. 169; Chouteau Spring v. Harris, 20 Mo. 382; Miller

v. Ins. Co., 50 Mo. 55; Johnson v. Laffin, 5 Dill. 65.

³ March v. R. R. Co., 43 N. H. 515; Burroughs v. R. R. Co., 67 N. C. 376; 12 Am. Rep. 611; Bend v. Susquehanna Bridge Co., 6 Har. & J. 128; 14 Am. Dec. 261; Hall v. United States Ins. Co., 5 Gill, 484; Merrimac Mining Co. v. Levy, 54 Pa. St. 227; 93 Am. Dec. 697; Same v. Bagley, 14 Mich. 501; Mann v. Currie, 2 Barb. 294; Hartford R. R. Co. v. Boorman, 12 Conn. 539; Webster v. Upton, 91 U. S. 65.

⁴ Messersmith v. Sharon Sav. Bank, 96 Pa. St. 440.

⁵ Brigham v. Mead, 10 Allen, 245.

⁶ People's Bank v. Kurtz, 99 Pa. St. 344; 44 Am. Rep. 112.

⁷ Thompson v. Adams, 12 Phila. 484.

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ILLUSTRATIONS.—A was the holder of shares as collateral security for a debt, without a transfer thereof to him on the books of the company. *Held*, not to be the legal or equitable owner of the stock, and therefore not liable as a stockholder: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547. One sold stock to A, and to B the right to the interest due upon the stock. *Held*, that the right to interest was an incident to the shares, and depended upon the title to them, and that B could not maintain an action against the company: *Manning v. Quicksilver Mining Co.*, 24 Hun, 360. T. transferred two thousand shares of stock to F., a niece of his wife, on the books of a corporation, but retained the certificates in his possession; and after his death, they were found in an envelope with his own name and that of F. indorsed thereon. F. had no knowledge of the transfer; she lived in the family of T., and was in all respects treated and regarded as his daughter. *Held*, that the transfer on the books of the corporation vested in F. the legal title: *Robert's Appeal*, 85 Pa. St. 84.

§ 461. Formalities Required by Charter in Transfer must be Observed.—The formalities required by the charter in the transfer of shares must be followed, or the transfer will not be effectual.¹ Thus where it is required that the transfer be made on the stock-books of the company, this must be done, or the legal title will not pass.² Where the by-laws of a corporation require that stock shall be transferred on the books of the company, a transfer by assignment and delivery only will not be effective, against a subsequent judgment creditor of the transferrer,³ or an attaching creditor without notice.⁴ The liability of a subscriber to stock is not discharged by an informal *ex parte* transfer of the shares in writing, not entered on the books of the corporation or recognized by it, accompanied with a private agreement of the transferee that the transferrer should not be liable for anything

¹ *Black v. Zacharie*, 3 How. 483; *v. Bear River Co.*, 5 Cal. 186; 63 Am. Union Bank v. Laird, 2 Wheat. 390. Dec. 117; *In re Murphy*, 51 Wis. 525.

² *Lippitt v. Paper Co.*, 15 R. I. 141; 2 Am. St. Rep. 886; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Brown v. Adams*, 5 Biss. 181; *Topeka Mfg. Co. v. Hale*, 39 Kan. 23; as in California and other states by statute: *Weston*

³ *People's Bank v. Gridley*, 9 Cent. L. J. 249.

⁴ *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; 60 Am. Rep. 789.

unpaid on the shares so transferred.¹ Shares in a bank, whose charter provides that they shall "be transferable only at its banking house and on its books," cannot be effectually transferred, as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment.² A provision in the by-laws of a corporation, requiring transfers of its capital stock to be made upon its books, may be waived by the company, and if waived at the request of a purchaser of the stock, or with his assent, he becomes a stockholder, and directly liable for future assessments.³ The secretary of a corporation cannot inquire into the motives of one who demands that his shares be transferred.⁴

ILLUSTRATIONS.—A by-law of a corporation provided that no shares of its stock shall be transferred on its books until the certificate has been surrendered to its president or shown to be lost. *Held*, to be binding on all its stockholders and their heirs: *State v. R. R. Co.*, 30 La. Ann., pt. 1, 308. A received from a bank a certificate of ten shares of its stock, expressed to be "transferable at the bank," and afterwards transferred it to plaintiff, who asked of the bank, but was refused, a transfer of the stock on its books, the bank having transferred, previous to any knowledge of plaintiff's claim, the stock to one who had bought it at a sale on execution. *Held*, that the stock, according to the terms of the certificate, was transferable only at the bank, and that plaintiff, not having notified the bank of his claim previous to the sale on execution, had no action against the bank: *Williams v. Mechanics' Bank*, 5 Blatchf. 59. The act incorporating a turnpike company provided that the shares of stock should be transferable only on the books of the company, in such manner as the company should by their by-laws direct; and a by-law of the company provided that the board of directors should prescribe the form of transfer to be registered by the clerk on the books of the company, and that no transfer should be valid unless so

¹ Bell's Appeal, 115 Pa. St. 88; 2 Am. St. Rep. 532.

² Fisher v. Essex Bank, 5 Gray, 373.

³ Upton v. Burnham, 3 Biss. 431.

⁴ In re Klaus, 67 Wis. 401.

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made and registered. *Held*, that a written assignment of stock, made *in pais* in the form prescribed by such by-law, and seasonably registered at length by the clerk on the books of the company, was a transfer on the books of the company within the meaning of the charter, and conveyed the legal title: *Northrop v. Curtis*, 5 Conn. 246; *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487; *Bridgeport Bank v. R. R. Co.*, 30 Conn. 231. M. delivered to the complainants certificates of stock in a corporation, accompanied by an irrevocable power of attorney for their transfer, as collateral security for his notes and renewals of them. The corporate charter declared the stock personal property, and "transferable on the books," and that "books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections," etc., by the stockholders. *Held*, that this transfer to complainants was effectual as against the attachment levied upon the stock thereafter by a creditor of M.: *Broadway Bank v. McElrath*, 13 N. J. Eq. 24. In the charter of a corporation it was provided that the stock might be "transferred on the books of the company." The company was empowered "to regulate the transfer of stock" by by-laws; and in certain cases to make assessments on stockholders, for raising funds for purposes of improvement, or purchasing lands in such amount as they may deem proper. *Held*, that the company could not make an assessment on any one who had ceased to be a member by transferring his stock; that the power "to regulate the transfer of stock" did not include the power to prevent transfers, nor to prescribe to whom the owner may sell, or to whom not, or on what terms; and that an assignment "on the books of the company" changed the ownership, without obtaining a new certificate, and an assignment on a separate paper, notice being given to the company, was valid against them: *Chouteau Spring Co. v. Harris*, 20 Mo. 382.

§ 462. **Equitable Assignments.**—Yet an assignment not in accordance with the rules of the corporation will constitute an equitable assignment, and the interests of the assignee will be protected by the courts.¹ The provisions as to registration are simply for the protection of the corporation, and as between the parties the assignment is good.²

¹ Morawetz on Corporations, sec. 326; Parrott v. Byers, 40 Cal. 614; Black v. Zacharie, 3 How. 483; U. S. v. Vaughan, 3 Binn. 394; 5 Am. Dec. 375; Bank v. Smalley, 2 Cow. 770; 14 Am. Dec. 526.

² McNeil v. Bank, 46 N. Y. 331; 7

Am. Rep. 341; Commercial Bank v. Kortright, 22 Wend. 348; 34 Am. Dec. 317; Duke v. Navigation Co., 10 Ala. 82; 44 Am. Dec. 472; Farmers' etc. Bank v. Wasson, 48 Iowa, 336; 30 Am. Rep. 398; Baldwin v. Canfield, 26 Minn. 43.

Until actual transfer, the title of the purchaser of stock is merely equitable, and persons dealing with him take the risk that the equitable title is such that he can compel a transfer of the legal title.¹ Equity will protect the claim of the holder of a certificate of stock, although the transfer was not made to him in the manner prescribed by the by-laws and charter of the corporation, and will compel the original owner thereof to pay a note given by him for the stock, in order to provide means for its redemption.² A certificate of stock assigned to secure a loan, but not transferred on the books of the corporation, vests a title in the assignee that the chancery court will protect against one attaching the stock, in a suit against the assignor, with knowledge of facts sufficient to put him on inquiry regarding the equitable ownership.³ The fact that the stock of a corporation is only transferable on the books of the company does not prevent a stockholder from making a valid pledge of his stock by delivering certificates thereof to his creditor.⁴ A transfer of stock by ticket, entry on the books, and surrender of the certificate, gives to the transferee, as between himself and the corporation, a complete title to the stock, although no certificate was issued to him in lieu of the one canceled.⁵ Precedence will be given to an unrecorded transfer of the stock of a bank which has passed no by-law on the subject, over a subsequent attachment by a creditor of the assignor.⁶ Where a vendor of stock has made efforts to get the assignment perfected on the transfer-books of the corporation, and on failure to accomplish this has made an effort to make the assignments as notorious as possible, using not only due diligence, but all possible diligence, his retention of possession is exempted from the condemnation of the law, and a perfect equitable title vests in his vendees,

¹ Wood v. Maitland, 10 Phila. 84.

² Home Stock Ins. Co. v. Sherwood, 72 Mo. 461.

³ Cheever v. Meyer, 52 Vt. 66.

⁴ Blouin v. Hart, 30 La. Ann., pt. 1, 714.

⁵ Bank v. Gifford, 47 Iowa, 575.

⁶ Scott v. Bank, 15 Fed. Rep. 494.

which will be protected as against subsequent attaching creditors of the vendor.¹

ILLUSTRATIONS.—The president of a corporation sold a number of shares of stock in the corporation, giving the purchaser a certificate providing that the shares were transferable "only on the books of the corporation, on the surrender of this certificate." After the president had ceased to act as such, the shares, not having been transferred on the books of the corporation, were attached in a suit against him by the company, as his property. *Held*, that the company were chargeable, under the circumstances, through their president, with notice of the sale of the shares by him, and that, in the absence of fraud on the part of the purchaser, the attachment did not affect the title of the latter: *Scripture v. Soapstone Co.*, 50 N. H. 571. A legal owner of a certificate of city stock, transferable by its terms only at the city treasurer's office, by appearance in person, or by attorney, indorsed the certificate in blank, and delivered it to another person, who hypothecated it to a bank. The owner died, and the certificate, by virtue of a transfer written over his name by the cashier, was transferred to the bank on the books of the city treasurer. *Held*, that the indorsement and delivery was an equitable assignment, and the transfer proper; and that the terms of the certificate as to transfer were to protect the corporation itself and purchasers without notice: *Fraser v. Charleston*, 11 S. C. 486. B. transferred, on the books of a corporation, his shares to G. as collateral security. Afterwards the necessity for the security being at an end, G., at B.'s request, indorsed and transferred the certificate to D., a creditor of B. Before any record of this transfer had been made on the corporation books, another creditor of B. attached the shares as B.'s property. *Held*, that the attachment could not be maintained: *Beckwith v. Burrough*, 13 R. I. 294. A stockholder transferred his stock in good faith, but did not cause the transfer to be made upon the books of the company, as required by the statute of incorporation. The company had no transfer-book, and the certificate required to be filed and recorded in the town clerk's office was not signed by the officers of the company, as required by its by-laws, but was recorded by the direction of the company, who acquiesced and recognized the transferee as the owner of the stock. *Held*, that the original stockholder was not liable to pay calls upon the stock after the transfer: *Isham v. Buckingham*, 49 N. Y. 216.

§ 463. Assignment of Shares by Indorsement of Certificate.—Shares of stock are assignable by indorsement.

¹ *Colt v. Ives*, 31 Conn. 25; 81 Am. Dec. 161.

of the certificate.¹ The indorsement need not be under seal.² And where the holder signs an assignment and a power of attorney to execute the transfer on the stock-books, with the name of the transferee left blank, the certificate will pass from hand to hand, and the last holder may fill up the blanks with his own name, and complete the transfer on the books of the company.³

§ 464. Effect of Assignment of Certificate by Indorsement—Rights of Purchaser.—Shares of stock have the attributes of negotiable paper. The holder of a certificate indorsed in blank gives a good title by delivery, and the purchaser does not take subject to his real title.⁴ One who takes in good faith and for valuable consideration a transfer of shares in the capital stock of a corporation is not bound to look behind the certificate assigned him, or to examine the books of the corporation to ascertain the validity of assignments.⁵ Certificates of stock are assignable, and pass by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be the *bona fide* owners, and an innocent purchaser thereof for value will hold them against the true owner where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee.⁶ In New York, New Jersey, Louisiana, and South Carolina it is held that a transfer by the delivery of the certificates is good against an attaching creditor of the transferrer, when the attachment is

¹ Morawetz on Corporations, sec. 328.

² Atkinson v. Atkinson, 8 Allen, 15.
³ Kortright v. Bank, 20 Wend. 91; 22 Wend. 348; 34 Am. Dec. 317; New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30; McNeil v. Bank, 46 N. Y. 325; 7 Am. Rep. 341; Holbrook v. Zinc Co., 57 N. Y. 661; Weaver v. Barden, 49 N. Y. 286; Leitch v. Wells, 48 N. Y. 586; Winter v. Belmont Mining Co., 53 Cal. 48; First Nat. Bank

v. Gifford, 47 Iowa, 575; Fraser v. Charleston, 11 S. C. 486; Matthews v. Bank, 1 Holmes, 396.

⁴ McNeil v. Nat. Bank, 46 N. Y. 325; 7 Am. Rep. 341; Winter v. Belmont Mining Co., 53 Cal. 428; Moodie v. Bank, 11 Phila. 366.

⁵ Mills v. Townshend, 109 Mass. 115.
⁶ Supply Ditch Co. v. Elliott, 10 Col. 327; 3 Am. St. Rep. 586. But see Young v. Iron Co., 85 Tenn. 180; 4 Am. St. Rep. 752.

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made after such transfer, but prior to any transfer having been made and entered upon the books of the company.¹ On the other hand, in Massachusetts, Maine, California, Connecticut, Vermont, Tennessee, Illinois, New Hampshire, and Pennsylvania the transferee is protected only when the transfer is made on the books of the corporation.² A conveyance of shares in a corporation is not within the recording acts, and a record does not charge with constructive notice.³ Stocks are articles of commerce, passing from hand to hand like commercial paper, and the doctrine of constructive notice by *lis pendens* is not applicable to them.⁴ In a certificate of stock issued to A "in trust," these words impose upon any transferee the duty of ascertaining A's authority to hypothecate the stock.⁵ On the sale of stock the vendor does not warrant that the corporation is a corporation *de jure*.⁶

§ 465. Lien of Corporation on Shares.—A corporation has no lien on the shares of its members for assessments

¹ *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Hunterdon Co. Bank v. Nassau Bank*, 17 N. J. Eq. 496; *McNeil v. Tenth National Bank*, 46 N. Y. 325; 7 Am. Rep. 341; N. Y. etc. R. R. Co. v. Schuyler, 34 N. Y. 30; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; 34 Am. Dec. 317; *Bluin v. Hart*, 30 La. Ann. 714; *State Bank of South Carolina v. Cox*, 11 Rich. Eq. 344; 78 Am. Dec. 458. In *Broadway Bank v. McElrath*, 13 N. J. Eq. 28, the court says: "To require a transfer of the stock to the lender as security for the loan against the right of attaching or execution creditors will at once destroy the value of the security, or compel the borrower to divest himself of his character as corporator, to forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the owner of stocks be deprived of the privilege of mortgaging or pledging his stock

for the security of a loan, without stripping himself of all his rights of ownership, more than the owner of any other property?" And see *Merchants' Bank v. Richards*, 6 Mo. App. 454.

² *Fisher v. Essex Bank*, 5 Gray, 373; 1 *American Railway Cases*, 127; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *Williams v. Mechanics' Bank* etc., 5 Blatchf. 59; *Brown v. Adams*, 5 Biss. 181; *People's Bank v. Gridley*, 9 Cent. L. J. 249; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Pinkerton v. R. R. Co.*, 42 N. H. 424; *Skowhegan Bank v. Cutler*, 49 Me. 315. But see *Cormick v. Richards*, 3 Lea, 1.

³ *Spalding v. Paine*, 81 Ky. 416.

⁴ *Leitch v. Wells*, 48 N. Y. 585.

⁵ *Budd v. Monroe*, 18 Hun, 316.

⁶ *Harter v. Eltzroth*, 111 Ind. 159.

or other debts due it, and hence has not a right to refuse to permit a transfer of shares to be executed upon the stock-book because the holder is indebted to the company.¹ But this lien may be given to the corporation by its charter or articles of association,² or by its by-laws,³ or by the usage of the company known to the stockholders.⁴ A power to make by-laws to regulate the management of the business of an association is sufficient to justify a by-law creating a lien on the stock.⁵ Where the charter provides that transfers of stock shall be made only according to the by-laws of the corporation, and a by-law is adopted prohibiting any transfer by a stockholder liable for any indebtedness to the company, such indebtedness by a firm of which a stockholder is a member is a lien on his stock.⁶ The by-law of a bank forbidding the transfer of stock where the owner is indebted to the bank is valid, although inconsistent with the general law of the state governing the transfer of property; and in case of the sale under execution of shares of stock, the purchaser cannot recover the shares in an action of trover against the bank, till such indebtedness be satisfied.⁷ Dividends due when notice of the assignment was received may be retained as security for the indebtedness of the assignor to the company.⁸ The provision in the charter of a bank, giving the bank a specific lien upon the stock of a share-holder

¹ *Heart v. State Bank*, 2 Dev. Eq. 111; *Williams v. Lowe*, 4 Neb. 398; *Vansands v. Middlesex Co. Bank*, 26 Conn. 114; *Neale v. Janney*, 2 Cranch C. C. 188; *Farmers' etc. Bank v. Wasson*, 48 Iowa, 340; *Sargent v. Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Massachusetts etc. Co. v. Hooker*, 7 Cush. 183; *Driscoll v. Manufacturing Co.*, 59 N. Y. 102; *Steamship etc. Co. v. Heron*, 52 Pa. St. 280; *Dana v. Brown*, 1 J. J. Marsh. 304; *People v. Crockett*, 9 Cal. 112; *Fitzhugh v. Bank*, 3 T. B. Mon. 126; 16 Am. Dec. 90.

² *Brent v. Bank*, 10 Pet. 596; *Grant v. Bank*, 15 Serg. & R. 140; *German Security Bank v. Jefferson*, 10 Bush,

326; *Arnold v. Bank*, 27 Barb. 424; *Leggett v. Bank*, 24 N. Y. 283.

³ *Vansands v. Middlesex etc. Bank*, 26 Conn. 144; *Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388; see *In re Dunkerson*, 4 Biss. 227.

⁴ *Morgan v. Bank*, 8 Serg. & R. 73; 11 Am. Dec. 573.

⁵ *Lockwood v. Mechanics' National Bank*, 9 R. I. 308.

⁶ *Geyer v. Ins. Co.*, 3 Pittsb. 41.

⁷ *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388.

⁸ *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 307.

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for debts due to the bank, does not by implication give a lien upon dividends accruing after the death of the shareholder.¹ The corporation may waive its lien,² as, for example, by permitting the transfer,³ or by representing to the transferee that the shares were unencumbered.⁴

ILLUSTRATIONS.—A stockholder of a corporation died insolvent and indebted to the corporation, and subsequently the directors, by resolution, prohibited the transfer of stock by any debtor of the company until the debt should be paid or secured. The stockholder's administratrix afterward sold the stock to a person who was ignorant of the indebtedness, and of the resolution. *Held*, that the corporation had no right to refuse to transfer the stock to the purchaser: *Steamship Dock Co. v. Heron*, 52 Pa. St. 280. A corporation had, by its charter, a lien upon the shares of stockholders for debts due from them to the corporation. A stockholder, caused his stock to be transferred on the books of the corporation, which was the only manner in which an assignment could be made, to a fictitious name, which was known to the officers of the corporation. A afterwards caused the stock to be transferred to the plaintiff, by a person represented by him to be the holder, as security for a debt due the plaintiff from A; but no money was paid on the transfer. *Held*, that the lien of the corporation upon the stock, for a debt due from A, was not thereby divested: *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350. The president of a bank, who was a surety upon the note of an insolvent stockholder to a third person, took an assignment of his stock for indemnity. The stockholder was also indebted to the bank. *Held*, that in the absence of fraud or concealment, the president had the right to such security as between himself and the bank, and the bank had no equitable right thereto: *Farmers' etc. Bank of Lineville v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. A banking association had not, before it obtained its charter, a lien on the stock of its stockholders. *Held*, that the lien given by the charter could not overreach a prior assignment of stock so as to preclude its transfer: *Neale v. Janney*, 2 Cranch C. C. 188. A, owning shares in a bank, transfers them to B, and the bank issues a new certificate to B, the terms of the certificate making the shares "transferable after the holder pays all his liabilities to said bank." *Held*, a waiver of the lien of the bank upon such shares for payments due from A: *Hill v. Pine River Bank*, 45 N. H.

¹ *Brent v. Bank*, 10 Pet. 595.

³ *Hill v. Bank*, 45 N. H. 300.

² *Morawetz on Corporations*, sec. 336; *Nat. Bank v. Bank*, 105 U. S. 217.

⁴ *Moore v. Bank*, 52 Mo. 377.

300. A bank, empowered to make "all needful rules and by-laws for the . . . mode and manner of transferring its stock," enacted a by-law that the stock should be assignable only on its books, and no transfer should be made by any stockholder indebted to it, and that the certificates of stock should contain notice of this provision. A certificate of stock was issued to C., reciting that the shares were "transferable at the office, in person or by attorney." C. pledged the certificate to P. as collateral security, by an assignment indorsed thereon, appointing him attorney to demand and obtain a transfer on the books. The bank refused P.'s demand for a transfer, on the ground that C. owed it more than the value of the stock, and that it had a lien on the stock therefor. P. had no actual notice of this claim at the time of the assignment. *Held*, that P. was entitled to the transfer: *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330. A statute gives to corporations at "all times" a lien on members' stock for "all" the debts due from them to the corporation. *Held*, that the lien attaches whether the debt accrued before or after a member's acquisition of stock: *Schmidt v. Hennepin County Barrel Co.*, 35 Minn. 511. A certificate of bank stock declared that the holder "is entitled to — shares of stock, transferable only at the bank, etc., on surrender of this certificate." *Held*, not to waive the lien given to the bank by its charter, providing that "all debts actually due to the company by a stockholder offering to transfer must be discharged before such transfer shall be made": *Reese v. Bank*, 14 Md. 271; 74 Am. Dec. 536.

§ 466. Remedies against Corporation for Refusing to Allow Transfer.—Where the corporation wrongfully refuses to allow the transfer on its books, the legal holder or the assignee may resort to a court of equity and obtain relief compelling the company to make the transfer.¹ It

¹ Morawetz on Corporations, secs. 337, 405. A bill in equity will lie to compel the delivery of certificates of stock to one who has already the equitable title to such stock, although a suit at law might also be sustained therefor: *Hill v. Rockingham Bank*, 44 N. H. 567. A stockholder may compel the company to transfer his stock upon its books. Such an action is purely one of equitable cognizance, and the defendant cannot demand a trial by jury: *Cushman v. Thayer Mfg. Co.*, 7 Daly, 330. Where the articles or by-laws of an association, formed with a view of being incorporated, provide

that the shares are "transferable on the books," nevertheless an assignee may sue the corporation, when formed, for refusing to issue certificates of stock, although the assignment was not made on the books: *Baltimore etc. R. R. Co. v. Sewell*, 35 Md. 238; 6 Am. Rep. 402. An assignee of stock in a railroad company, on which an installment remains unpaid by the original subscriber, may, upon properly tendering the same, with interest, maintain an action in equity to compel the company to issue to him a stock certificate: *Iron R. R. Co. v. Frink*, 41 Ohio St. 321; 52 Am. Rep. 84.

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has also been held that *mandamus* will lie to compel the officers of a corporation to make a transfer on its books,¹ and it is likewise held that the assignee may treat the refusal to transfer as a conversion, and sue the company for the value of the shares.² Where a corporation unreasonably refuses to transfer shares of stock, unless under a decree of court, costs will be decreed against it.³ A corporation cannot be compelled to make a transfer upon its books of stock which has been issued in violation of the charter, even though all the stockholders may have consented to the issue.⁴ On failure to transfer stock at the request of a pledgee, a bank is not liable for subsequent depreciation of the stock.⁵

It is no defense to an action of this kind that the president was sick and unable to sign a new certificate, the refusal not being put at the time on that ground, nor that the purchaser did not leave the old certificate at the time he made the transfer.⁶ The holder of a certificate of stock may maintain an action for damages against one who, having assigned the certificate, causes the corporation to refuse to transfer the stock on its books, by presenting to the corporation an affidavit that he had lost the certificate, and procuring a new certificate to be issued in its stead

¹ Green Mount. etc. Tp. Co. v. Bulla, 45 Ind. 1; Townsend v. McIver, 2 S. C. 25; Campbell v. Morgan, 4 Ill. App. 105; Cooper v. Canal Co., 2 Murph. 195; People v. Crockett, 9 Cal. 112. *Contra*, Baker v. Marshall, 15 Minn. 177; State v. Rombauer, 46 Mo. 155; Wilkinson v. Bank, 3 R. I. 22; American Asylum v. Phoenix Bank, 4 Conn. 172; State v. Guerrero, 12 Nev. 105; Stackpole v. Seymour, 127 Mass. 104; Ex parte Fireman's Ins. Co., 6 Hill, 243; Kimball v. Union Water Co., 44 Cal. 173; 13 Am. Rep. 157.

² Commercial Bank v. Kortright, 20 Wend. 90; 22 Wend. 348; 34 Am. Dec. 318; Scripture v. Company, 50 N. H. 571; Protection Ins. Co. v. Osgood, 93 Ill. 69; Merchants' Nat. Bank v. Richards, 6 Mo. App. 461; Helm v.

Swiggett, 12 Ind. 194; Pinkerton v. R. R. Co., 42 N. H. 424; Bank v. McNeil, 10 Bush, 54; Comean v. Guild etc. Oil Co., 3 Daly, 218; Baltimore etc. R. R. Co. v. Sewell, 35 Md. 238; German Building Ass'n v. Sendmeyer, 50 Pa. St. 67; Morgan v. Bank, 8 Serg. & R. 73; 11 Am. Dec. 575; Sargent v. Franklin Ins. Co., 8 Pick. 90; 19 Am. Dec. 306; Ramsey v. R. R. Co., 7 Abb. Pr., N. S., 183; Carroll v. Multanphy Savings Bank, 8 Mo. App. 249; Bond v. Ins. Co., 99 Mass. 505; 97 Am. Dec. 49.

³ Isagi v. R. R. Co., 129 Mass. 46.

⁴ People v. Sterling Mfg. Co., 82 Ill. 457.

⁵ Dayton Bank v. Merchants' Bank, 37 Ohio St. 208.

⁶ Bond v. Mount Hope Iron Co., 99 Mass. 505; 97 Am. Dec. 49.

upon executing a bond "to save said company harmless from all loss or damage by reason of said second issue of stock, and from any liability on account of said certificates, and of stock described in said affidavit."¹

ILLUSTRATIONS. — By the terms of a stock certificate it was transferable on the books of the corporation only upon its production. B, the owner of such certificate, transferred it to A. No transfer was made on the books. After B's death, his administrator represented that the certificate was lost, and the corporation thereupon issued a new one to him, made a transfer on its books, and paid to him dividends. *Held*, that notwithstanding A could compel the issue of a certificate to himself, but that the dividends were properly paid to B's administrator, as no rule required the production of a certificate upon making a demand for dividends: *Brisbane v. R. R. Co.*, 94 N. Y. 204. The purchaser, at a sheriff's sale on execution of stock in a corporation whose charter gave it a pre-emption right to its stock, filed a bill in equity against the corporation to compel a transfer of the purchased stock, without first demanding such transfer. *Held*, no reason for dismissing the bill: *Barrows v. National Rubber Co.*, 12 R. I. 173. C's husband, without consideration, executed in blank an assignment and power of attorney indorsed on a certificate of shares of stock of a manufacturing corporation, and delivered the same to her. He afterwards, for a valuable consideration, executed an assignment of the stock to B., and caused a transfer to be made to B. on the corporation's books, B., who was an officer thereof, knowing of the assignment to C. By the terms of the certificate, the stock was only transferable upon the books on surrender of the certificate. *Held*, that, it being the corporation's duty to resist any transfer without such surrender, the transfer to B. was no valid excuse for the corporation's refusing C.'s demand for a transfer. The fact that the assignment to C. was without consideration was immaterial. Such demand need not be made by the one whose name was inserted as attorney: *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 865; 32 Am. Rep. 315.

§ 467. **Liability of Corporation for Making or Permitting Unauthorized Transfers.** — "The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having

¹ *Greenleaf v. Ludington*, 15 Wis. 558; 82 Am. Dec. 698.

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authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made."¹ Therefore if the shares are transferred upon the stock-book upon a forged indorsement, or a forged power of attorney, the real owner is not divested of his right as a stockholder.² So a transfer of stock by a corporation upon its books in the absence of the original certificate is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby.³ A corporation permitting stock held by trustees to be transferred without authority from the will creating the trust, or from the court having jurisdiction thereof, under circumstances making the corporation chargeable with knowledge, will be compelled to make good the loss to the trust estate, by the conversion to their own use by the trustees of the proceeds of the stock so transferred.⁴ A corporation which has issued a certificate of stock to a person as trustee, and has notice of the name of the *cestui*, but on the trustee's wrongful transfer of the certificate issues a new one without making inquiry, is liable to the rightful owner thereby injured, without proof of collusion between the trustees and itself.⁵ A bank whose certificates of stock entitle the stockholder upon their face to so many shares, which are

¹ *Telegraph Co. v. Davenport*, 97 U. S. 371. A corporation must protect its share-holders from unauthorized transfers of their stock upon its books so far as the exercise of proper diligence and care will enable it to do so; and must respond to them in damages for any injury sustained by them from its failure to exercise such care and diligence: *Caulkins v. Gaslight Co.*, 85 Tenn. 683; 4 Am. St. Rep. 786.

² *Tel. Co. v. Davenport*, 97 U. S. 369; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Pollock v. Nat. Bank*, 7 N. Y. 274; 57 Am. Dec. 521; *Sewall v. Boston Water Power Co.*, 4 Allen, 277; 81 Am. Dec. 701.

³ *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586.

⁴ *Stewart v. Firemen's Ins. Co.*, 53 Md. 564.

⁵ *Loring v. Salisbury Mills*, 125 Mass. 133.

transferable on the books by attorney or in person, when the certificates are surrendered, but not otherwise, and which allows a stockholder to transfer his stock on the books of the bank without producing and surrendering his certificates, is liable to a *bona fide* transferee for value of the same stock, who produces the certificates with a properly executed power of attorney to transfer. The fact that the bank has received no notice of the latter transfer is immaterial.¹

ILLUSTRATIONS.—Plaintiff took in the regular course of business an assignment of stock in the defendant insurance company as security for a loan, presented the certificates to the company, and received new certificates in lieu thereof. The assignment turned out to be a forgery. *Held*, that the plaintiff, and not the insurance company, must sustain the loss: *Brown v. Fire Ins. Co.*, 42 Md. 384; 20 Am. Rep. 90. The infant plaintiffs owned stock in the defendant corporation standing in the name of "P., guardian." The guardian placed the certificate with a blank indorsement in the hands of D., his counsel, for purposes connected with his trust. D. procured an order of court permitting a sale and reinvestment, and then hypothecated the certificate to the S. bank as security for a loan for his personal use. H., who was president of the bank, and also of the defendant, with another purchased the stock from the bank, and had it transferred by the defendant to the purchasers. *Held*, that the defendant was chargeable with knowledge of the trust and its beneficiaries, and liable to respond to the plaintiffs for the stock: *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396; 32 Am. Rep. 479. Certificates of the capital stock of a corporation taken without the owner's knowledge, and with a forged power of attorney delivered for sale to auctioneers, were sold by them at auction, and delivered, together with a new certificate in their own name, which they had received from the corporation, to the purchaser; the purchaser presented the certificate to the corporation, which thereupon issued to him a new certificate in his own name. *Held*, in a suit by the owner against the corporation and purchaser, that the owner was entitled to a new certificate from the corporation, and to the dividends, but not to a decree against the purchaser, and that the rights between the corporation and the purchaser must be settled in a suit between them: *Pratt v. Taunton Copper Company*, 123 Mass. 110; 25 Am. Rep. 37. The signatures to powers of attorney for transfer were

¹ *Bank v. Lanier*, 11 Wall. 369.

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course of business insurance communicates to the thereof. The at the plaintiff, the loss: *Brown* the infant plain- anding in the the certificate his counsel, for in order of court hypothecated the an for his per- and also of the the bank, and hasers. *Held*, ge of the trust e plaintiffs for 396; 32 Am. corporation taken d power of at- d by them at ficate in their oration, to the e to the corpo- tificate in his e the corpora- a new certifi- but not to a s between the a suit between . 110; 25 Am. transfer were

genuine, but at the time of the transfer were thirteen years old. *Held*, that the corporation was put on inquiry, and was bound first to ascertain if the powers had been revoked: *Pennsylvania R. R. Co.'s Appeal*, 86 Pa. St. 80. Certain stock stood on the books of a corporation in the names of two persons, "executors of A." It was then transferred on the books to "B, guardian," and a certificate issued in B's name. B was the guardian of the minor children of A. B indorsed the certificate and intrusted it to C, his attorney. C, by a petition in B's name, procured an order from a circuit judge for the sale of the stock and reinvestment of the money. C then hypothecated the stock to a bank for money for his own use. C failed to redeem, and the stock was sold, the bank purchasing, and afterwards transferring it to its president, E, also president of the corporation, and to F. In an action by the wards, *held*, that the books of the corporation, the certificate of stock, and order of the judge were sufficient to put E on inquiry, and charge him with a knowledge of the trust and conversion; that his knowledge in the matter was the knowledge of the corporation of which he was president, and that the corporation, as well as B, the guardian, was liable: *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396.

§ 468. Status of Shares as Property.—Shares in a corporation are not real property even where the corporation owns real estate.¹ They are not an "interest in land" within the statute of frauds,² but stock in an incorporated company is "property" within the meaning of the Kentucky code.³ They are not subject to dower.⁴ On the death of the owner, they pass to the executor, and not to the heir.⁵ They are generally by statute declared to be personal property.⁶ They are "goods, wares, and merchandise," within the statute of frauds.⁷ A share of the capital stock gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it,

¹ *Edwards v. Hall*, 6 De Gex, M. & G. 74.

² *Bradley v. Holdsworth*, 3 Mees. & W. 422.

³ *Field v. Montmollin*, 5 Bush, 455.

⁴ *Johns v. Johns*, 1 Ohio St. 350.

⁵ *Hutchins v. Bank*, 12 Met. 426. *Contra*, *Welles v. Cowles*, 2 Conn. 567.

⁶ *Mohawk etc. R. R. Co. v. Clute*, 4 Paige, 384; *Kuhn v. McAllister*, 1 Utah, 273; *Griffith v. Watson*, 19 Kan. 23; *Union Bank v. State*, 9 Yerg. 490; *Bank v. Waltham*, 10 Met. 334.

⁷ *Fine v. Hornsby*, 2 Mo. App. 61.

of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation.¹

§ 469. **What are Profits.**—By “profits” is meant the excess of receipts over expenditures, or the net earnings.² Profits for the year mean the surplus receipts, after paying expenses and restoring the capital to the position it was in on the first day of the year.³

§ 470. **Dividends and Interest can only be Paid out of Profits.**—Dividends can only be paid out of profits, and cannot be taken out of the capital,⁴ and interest on shares must be paid from the same source.⁵ A corporation has no power to contract for the payment of interest or dividends on its capital stock, in excess of the earnings of the company.⁶ The action of directors in declaring a dividend with a knowledge that there are no profits is illegal.⁷

§ 471. **Distribution of Profits—Discretion of Directors.**—It is generally in the discretion of the directors whether profits shall be distributed in dividends, or shall be al-

¹ *Burrall v. R. R. Co.*, 75 N. Y. 211.

² In *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 307, the court say: “The capital stock of a corporation is like that of a copartnership or joint-stock company, the amount which the partners or associates put in as their stake in the concern. To this they add upon the credit of the company from the means and resources of others, to such extent as their prudence or the confidence of such other persons will permit. Such additions create a debt; they do not form capital. And if successful in their career, the surplus over and above their capital and debts becomes profits, and is either divided among the partners and associates, or used still further to extend their operations.” In *St. John v. R. R. Co.*, 10 Blatchf. 271, 22 Wall. 136, Blatchford, J., said: “Net earnings are properly the gross receipts,

less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profits of the shareholders to go towards dividends, which in that way are paid out of the net earnings”: *Connolly v. Davidson*, 15 Minn. 519; *Eyster v. Centennial Board*, 94 U. S. 500.

³ *Hazeltine v. R. R. Co.*, 79 Me. 411; 1 Am. St. Rep. 330.

⁴ *Morawetz on Corporations*, sec. 344.

⁵ *Rutland R. R. Co. v. Thrall*, 35 Vt. 543.

⁶ *Pittsburg etc. R. R. Co. v. Allegheny County*, 63 Pa. St. 126.

⁷ *Slayden v. Coal Co.*, 25 Mo. App. 439.

lowed to accumulate for future use.' But the directors must not abuse this discretion. They cannot willfully withhold profits, or apply them to purposes not authorized by the charter.² Dividends declared by the directors and received by the stockholders may be reclaimed by the directors, if illegally declared under a misapprehension of the right to declare them; and if there be an assignment by the corporation to a trustee, such right to reclaim dividends improperly declared and paid passes to the assignee, if the terms of the assignment are sufficiently comprehensive to embrace them.³ A corporation owning property may increase either income or capital out of money in its hands, according to the discretion of its directors; and courts will not go behind their action, and attempt to ascertain how they came by the funds out of which they declare either cash or stock dividends.⁴

§ 472. Stock Dividends.—The corporation may, instead of distributing the profits in the form of dividends, issue new stock and distribute it among the stockholders.⁵ There is nothing in the law, nor public policy, prohibiting the issue of scrip dividends to represent the surplus earnings of a corporation.⁶ A stock dividend belongs to the holders of the stock at the time of the declaration of the dividend, without regard to the source from which, or the time during which, the funds divided were acquired

¹ Morawetz on Corporations, sec. 348; King v. R. R. Co., 29 N. J. L. 82.

² Beers v. Bridgeport Co., 42 Conn. 17; Pratt v. Pratt, 33 Conn. 446; Scott v. Eagle Fire Ins. Co., 7 Paige, 203.

³ Lexington etc. Ins. Co. v. Page, 17 B. Mon. 412.

⁴ Minot v. Paine, 99 Mass. 101; 96 Am. Dec. 705.

⁵ Morawetz on Corporations, sec. 349.

⁶ Williams v. Western Union Tel. Co., 61 How. Pr. 216. Its charter, and the statute prohibition against declaring dividends except from sur-

plus profits, and against a division of capital stock, without consent from the legislature, make the action of the Western Union Telegraph Company, of January, 1881, in declaring and distributing a stock dividend, *ultra vires* and void; and the court will so adjudge at the instance of a stockholder, who, but for the fact that the public have an interest, would be held to have precluded himself of the right to complain by acquiescence in the action of the company; Williams v. Western Union Tel. Co., 48 N. Y. Sup. Ct. 349.

by the corporation.¹ Whether the distribution by a corporation of its earnings among its stockholders is an apportionment of stock or a division of profits depends upon the substance and intent of the action of the corporation, as shown by its votes.² Cash dividends, however large, are to be regarded as income, and stock dividends, however made, as capital. A cash dividend is an income from capital, and a stock dividend is an accretion to capital.³

§ 473. Issuing New Stock—Increasing the Capital Stock.—Where the corporation increases its capital by issuing and selling new shares, every old stockholder has a first right to them in proportion to the number of shares held by him.⁴

§ 474. Payment of Dividends.—The shareholder has no rights to profits until a dividend has been declared or is wrongfully withheld.⁵ But when a dividend has been declared, each stockholder has a right to be paid his share, which he may recover by *assumpsit* against the corporation,⁶ or equity will compel payment.⁷ *Mandamus* is not a proper remedy. Directors who have failed to declare dividends at the charter time cannot declare one extending over the period of their failure.⁸ Unpaid dividends of a joint-stock company are assets, and liable for the debts of the company.⁹ Dividends are to be considered as divided and paid over to the stockholders of an insurance company when the stockholders have received

¹ *Jermain v. R. R. Co.*, 91 N. Y. 483.

² *Rand v. Hubbell*, 115 Mass. 461; 15 Am. Rep. 121.

³ *Minot v. Paine*, 99 Mass. 101; 96 Am. Dec. 705.

⁴ *Eidman v. Brown*, 58 Ill. 444, *Contra* as to old stock which has come back into the hands of the corporation. This may be sold on the market: *Page v. Smith*, 48 Vt. 290.

⁵ *Morawetz on Corporations*, sec. 351.

⁶ *King v. R. R. Co.*, 29 N. J. L. 82, 504; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Jackson v. Plankroad Co.*, 31 N. J. L. 277; *Westchester R. R. Co. v. Jackson*, 77 Pa. St. 321.

⁷ *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657.

⁸ *Gordon v. R. R. Co.*, 78 Vt. 501.

⁹ *Curry v. Woodward*, 44 Ala. 305.

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the same in money, or in credits on stock-notes in possession of the company.¹ A stockholder who alleges that his right to participate in a dividend declared by the corporation has been wrongfully denied by it cannot maintain an action in the first instance for money had and received against another stockholder who has participated in such dividend.² The acceptance by a stockholder of a dividend upon his stock can be no ratification of the illegal conduct of the directors.³ The sale of shares gives the purchaser the right to dividends already declared, but not payable until after the transfer of the stock.⁴ Where a contract is made for the sale of stock, on which a dividend has been declared, payable upon a day subsequent to the agreed time for delivery of the stock, such dividend does not pass to the buyer.⁵ Unless the resolution declaring the dividend otherwise directs the officers, they must pay the dividend to the persons holding stock on the books of the company at the date when the dividend is declared.⁶ Funds of a corporation are to be distributed among those who are its stockholders at the time when the dividend is declared, no matter when such funds accrued.⁷ Dividends are personalty, and do not go to the heir.⁸ Extraordinary dividends belong to the person holding a life interest in the stock, upon which such dividends are earned.⁹ Increase of capital of corporation should be kept for remainderman, and an increase of income should be paid to the tenant for life.¹⁰ Where the property of a corporation consists wholly of real estate, and a part of it is taken by right of eminent domain, the compensation therefor, if distributed as a dividend to the share-holders, belongs

¹ Citizens' etc. Ins. Co. v. Lott, 45 Ala. 185.

² Peckham v. Van Wagenen, 83 N. Y. 40; 38 Am. Rep. 392.

³ Hilles v. Parrish, 14 N. J. Eq. 380.

⁴ Burroughs v. R. R. Co., 67 N. C. 376; 12 Am. Rep. 611.

⁵ Spear v. Hart, 3 Robt. 420.

⁶ Jones v. Railroad Co., 17 How. Pr. 529; 27 Barb. 353.

⁷ Goodwin v. Hardy, 57 Me. 143; 99 Am. Dec. 758.

⁸ Welles v. Cowles, 4 Conn. 182; 10 Am. Dec. 115.

⁹ Woodruff's Estate, 1 Tuck. 58.

¹⁰ Minot v. Paine, 99 Mass. 101; 96 Am. Dec. 705.

to the capital, and not to the income of a trust fund invested in the shares.¹ Where a corporation makes a dividend of the proceeds of a sale of part of its original franchise and property, it will be regarded, as between a life tenant and a remainderman of part of the stock, as capital, and not as income.² When a corporation declares a dividend on its stock payable in money, the stockholder at the time, whether a life tenant or remainderman, is entitled to it, irrespective of its source, amount, or the length of time in which it was earned.³ If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation, shares of additional stock distributed to the trustee as a lawful dividend thereon accrues as capital, although they represent net earnings of the corporation.⁴ A stockholder in a corporation has an interest, in proportion to the amount of his stock, in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in the business of the company; and this right does not depend upon the time when he becomes a stockholder, but attaches whenever he acquires the stock, and entitles him to all subsequent dividends.⁵ When an administrator illegally disposes of stocks at private sale, and the same are, by direction of the administrator, transferred on the books of the company, and it is not known to the heir who is the holder thereof, the company is a proper party defendant to a bill filed to discover the owner of the stock, and praying a retransfer of the same and an account of the dividends.⁶ Dividends on stock correspond to the hire of property. The purchaser of railroad stock from an administrator or at an unauthorized private sale is liable in equity for the dis-

¹ *Heard v. Eldredge*, 109 Mass. 258; 12 Am. Rep. 687.

² *Vinton's Appeal*, 99 Pa. St. 434; 44 Am. Rep. 116.

³ *Richardson v. Richardson*, 75 Me. 570; 46 Am. Rep. 428.

⁴ *Minot v. Paine*, 99 Mass. 101; 36 Am. Dec. 705.

⁵ *Jones v. R. R. Co.*, 57 N. Y. 196.

⁶ *Southwestern etc. R. R. Co. v. Thomason*, 40 Ga. 408.

tributees of the estate to which the stock belonged for all damages resulting directly from the conversion, including, besides the value of the shares, the consequent loss of dividends, with interest thereon. The dividends to be treated as lost are all those innocently paid by the corporation after the illegal purchase and up to the time of the decree, whether paid to the purchaser himself or to those holding under him, immediately or remotely, by regular transfer.¹ Dividends already paid to the stockholders cannot be reached by creditors of the corporation.² A corporation which has issued negotiable certificates for an extra dividend, making them payable at a time fixed therein, or sooner at its option, and elects to redeem them sooner, cannot refuse to pay a stockholder the amount of a lost certificate. It may protect itself by exacting indemnity, as in case of lost commercial paper.³

As a rule, dividends cannot be apportioned, but must be paid to the owner of the share at the time the dividend is declared.⁴ But in an early case in South Carolina, where a person entitled for life to dividends on bank stock, payable half-yearly, died just before a semi-annual dividend was declared, it was held that the dividend should be apportioned, and a part paid to his executor.⁵

ILLUSTRATIONS. — L. contracted, previous to July 3d, to sell shares of stock in a corporation to B. at B.'s option, to be accepted by July 16th. On the last-named day the shares were transferred to B. On July 3d a dividend on the stock was declared, payable August 1st. *Held*, that the dividend belonged to L.: *Bright v. Lord*, 51 Ind. 272; 19 Am. Rep. 732. The directors of a joint-stock corporation voted "to declare a dividend of seventy per cent upon the capital stock, the amount to be placed *pro rata* to the credit of each stockholder, and made payable without interest at such time as may be directed by the board." The dividend was based upon profits actually received.

¹ *Nutting v. Thomasson*, 57 Ga. 418.

² *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98; 2 Am. Rep. 562.

³ *Butler v. Glen Cove Starch Co.*, 18 Hun, 37.

⁴ *Goodwin v. Hardy*, 57 Me. 145;

March v. R. R. Co., 43 N. H. 520;

Brundage v. Brundage, 60 N. Y. 551;

Hyatt v. Allen, 56 N. Y. 553; 15 Am. Rep. 449.

⁵ *Ex parte Rutledge*, 1 Harp. Eq.

Goodwin v. Hardy, 57 Me. 145; 65; 14 Am. Dec. 690.

Held, that the corporation thereby became indebted to each stockholder for the amount of his share of the dividend, payable within a reasonable time, and that on the refusal of the corporation, the stockholder could enforce payment by the aid of a court of equity: *Beers v. Bridgeport Spring Co.*, 42 Conn. 17. A testator bequeathed the "income, profit, and products" of certain stock in a corporation to a person for life, remainder over. Afterward the corporation increased its capital stock, allowing each stockholder the option to take at par as many new shares as he held of the old. The trustees under the will sold part of their "options" to take the new shares, and with the proceeds bought new shares. *Held*, that the new shares were capital, and went to the remainderman: *Moss's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164. On the sixth of March A made a written proposal to B to convey to him all his right and title in certain shares in a turnpike, at five dollars per share, provided B gave security for the price by the 24th of March. After this A received a dividend on the shares, and B, not knowing that the dividend had been received, on the eighteenth of March gave security for the price, and took a conveyance of all the interest A then had in the shares. *Held*, that the dividend received by A belonged to B, and that B could recover it in an action for money had and received: *Harris v. Stevens*, 7 N. H. 454. The directors of a corporation declared two dividends, the one payable on the day the same was declared and the other at the option of their agent. *Held*, that although no day was definitely named for the payment of the second dividend, and no time fixed for closing or opening books, to determine who otherwise would be entitled, stockholders who were such on the day the dividend was declared are the persons who should receive it: *Hill v. Newichawanack Co.*, 48 How. Pr. 427. A assigned to B a stock certificate containing a statement that stock was transferable only upon the books of the corporation. B failed to obtain such transfer. A died. *Held*, that the corporation, having paid dividends to A's administrator, could not be held liable to B for their amount, no presentation of a certificate being necessary upon a demand for dividends by the owner of record of the stock or his personal representative: *Brisbane v. R. R. Co.*, 25 Hun, 438. A railroad company, having declared a dividend upon its stock, deposited a sufficient sum with bankers expressly to pay such dividend, but before the whole amount so deposited was paid out, withdrew the remainder and subsequently became insolvent, and a receiver was appointed. *Held*, that the fund so deposited should be regarded as specially appropriated for the payment of the dividend, and that the stockholders acquired in equity a lien upon such fund, to the extent of the amount to which they were

respectively entitled, and that the lien followed the fund in the hands of the receiver: *Matter of Le Blanc*, 4 Abb. N. C. 221.

§ 475. Right to Examine Books—Other Rights.—A stockholder has a right to examine the books of the corporation,¹ and the court will compel by *mandamus* the officers of the corporation to accord this right to the stockholder,² or to those entitled to see or use them. And this will include the agent, solicitor, counsel, or expert of the party asking therefor,³ or a share-holder who is also the solicitor of opposing litigants.⁴ It has been held that the fact that a stockholder has been refused permission to examine the books of the corporation with the assistance of an expert, his bill charging no fraud or misconduct on the part of the directors, but merely alleging that the reason for his examination is to discover whether he has been defrauded by the directors in the distribution of the assets, presents no ground of equitable jurisdiction; his remedy is at law by *mandamus*.⁵

¹ Field on Corporations, sec. 168; Angel and Ames on Corporations, sec. 681, 682; *Field v. R. R. Co.*, 18 Fed. Rep. 471; *People v. Throop*, 12 Wend. 183; *Sinclair v. Gray*, 9 Fla. 71.

² *People v. Throop*, 12 Wend. 183; *People v. Mott*, 1 How. Pr. 247; *People v. Pacific Mail Steam. Co.*, 50 Barb. 280; *Sage v. R. R. Co.*, 70 N. Y. 220; *State v. Goll*, 32 N. J. L. 285; *St. Luke's Church v. Slack*, 7 Cush. 226; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111; 51 Am. Rep. 184; *Cockburn v. Union Bank*, 13 La. Ann. 289.

³ *Hide v. Holmes*, 2 Molloy, 372; *Blair v. Massey*, L. R. 5 I. R. Eq. 623; *Joint-Stock Discount Co.'s Case*, 36 L. J. Eq. 150; *Bonnardet v. Taylor*, 1 Johns. & H. 383; *Attorney-General v. Whitwood*, 40 L. J. Ch. Div. 592; *Lindsay v. Gladstone*, L. R. 9 Eq. 132; *Williams v. Prince of Wales Ins. Co.*, 23 Beav. 358; *State v. Bienville Co.*, 28 La. Ann. 204; *Ballin v. Ferst*, 55 Ga. 546.

⁴ *Reg. v. Wilts Co.*, 29 L. T., N. S., 922; *Kingsford v. R. R. Co.*, 16 Com. B., N. S., 761.

⁵ *Stettauer v. New York etc. Construction Co.*, 42 N. J. Eq. 46. In a note to this case Mr. Stewart says: "An inspection will not be allowed to gratify mere idle curiosity: *People v. Walker*, 9 Mich. 328; nor because some of the books are necessarily kept in another state, where the main office is, in violation of a statute of Connecticut: *Pratt v. Meridan Co.*, 35 Conn. 36. See *Sykes's Case*, 10 Beav. 162; *Ervin v. R. R. Co.*, 22 Hun, 566; *Cain v. Pullen*, 34 La. Ann. 511; nor to fish out a defense: *Birmingham Co. v. White*, 1 Q. B. 282; *Imperial Gas Co. v. Clarke*, 7 Bing. 95. See *Hoyt v. Am. Ex. Bank*, 1 Duer, 652; *Shoe and Leather Ass'n v. Bailey*, 17 Jones & S. 385; nor upon an allegation of belief that the company's affairs are being conducted improperly, and the officers unduly chosen, and alleging mismanagement in some particulars not affecting petitioners, nor then in dispute: *Rex v. Merchant Tailors' Co.*, 2 Barn. & Adol. 115; nor to furnish materials to the other side for a new trial: *Pratt v. Goswell*, 9 Com.

Where the property of a corporation is sold on execution against it, a stockholder may buy it for his individual benefit, and he will not be bound to account for it to the other stockholders, although it was bid in by him at a price much below its value, if there was no fraud in the sale.¹ Where one of the owners of a ferry, in his lifetime, refused to take the value of his interest in the ferry in the stock of a bridge company to erect a bridge in the same place, as authorized by the act of incorporation of the bridge company, such refusal being after the requisite amount of stock had been subscribed, and the bridge erected, his heirs could not, after his death, come in as stockholders, but were concluded by the refusal of their ancestor.² One claiming to be a share-holder of a corporation, but not recognized as such in the payment of a dividend, cannot maintain an action against a recog-

B., N. S., 706; nor to ascertain whether petitioner would better accept, with the other share-holders, what was offered her for her holding in an old company, which was being wound up, rather than proceed with an arbitration; Glamorganshire Banking Co., L. R. 28 Ch. Div. 620; nor to establish a justification in an action against the petitioner for libel, imputing insolvency to the company; Metropolitan Co. v. Hawkins, 4 Hurl. & N. 146. See Finlay v. Lindsay, 7 I. R. C. L. 1; Collins v. Yates, 27 L. J. Ex. 150; Opdyke v. Marble, 44 Barb. 64; nor to examine all the books of the company for the preceding fifty years, because petitioner alleges that he is dissatisfied with the management of the company and with the accounts, and on other grounds: Reg. v. Grand Canal, 1 Irish Law Rep. 327; nor where the petition does not specify the particular books asked for, and the object of the petitioner in making the application to the officers, and also to the court: Reg. v. London and St. Catherine's Docks Co., 44 L. J. Q. B. 4. See Hunt v. Hewitt, 7 Ex. 226; Pepper v. Chambers, 7 Ex. 226; New England Iron Co. v. N. Y. Loan Co., 55 How. Pr. 351; Central R. R.

v. R. R. Co., 53 How. Pr. 45; Commissioners v. Lemly, 85 N. C. 341; Walker v. Granite Bank, 44 Barb. 39; nor whether certain allegations in the applicant's affidavit are true; nor whether he has documents in his possession relating to the matters in issue: Rayner v. Alnusen, 15 Jur. 1060. The court may control the manner of the examination: Williams v. Prince of Wales Ins. Co., 23 Beav. 338. An appeal was held to lie from an order granting a party leave to inspect and examine the books of a corporation, the appellant: Thompson v. R. R. Co., 9 Abb. Pr., N. S., 212; Lancashire Co. v. Greatorex, 14 L. T., N. S., 290; Cummer v. Kent, 38 Mich. 351; Commissioners v. Lemly, 85 N. C. 341. See Saxby v. Easterbrook, L. R. 7 Ex. 207; Bustros v. White, L. R. 1 Q. B. D. 423; Clyde v. Rogers, 24 Hun, 145; McCargo v. Crutcher, 27 Ala. 171; Sage's Case, 70 N. Y. 221. As to the costs of an inspection, see Hill v. Philp, 7 Ex. 232; Davey v. Pemberton, 11 Com. B., N. S., 629; Gardner v. Dangerfield, 5 Beav. 389.

¹ Mickles v. Rochester City Bank, 11 Paige, 118.

² White v. Florence Bridge Co., 4 Ala. 464.

nized share-holder for a part of the dividend; he can only enforce recognition by an action against the corporation itself.¹

ILLUSTRATIONS. — A petition alleged that the petitioner held a large amount of the stock of a corporation, that notwithstanding its prosperous business, no dividend had been declared for nine years, and charged malfeasance of the president and two of the directors, by which the principal part of the company's business had been diverted for their personal benefit, and its funds misappropriated. It further alleged that he had, at a stockholders' meeting, and at other times, asked for information touching the corporation's transactions, which request had invariably been refused, and that he proposed to file a bill in equity against the corporation and its officers, for which purpose it was necessary that he should see the books and papers in order to state the facts correctly. *Held*, that a *mandamus* would issue for the production of such books and papers as contained information upon the subjects specified in the petition: *Commonwealth v. Phoenix Ins. Co.*, 105 Pa. St. 111; 51 Am. Rep. 184. The petition averred that a public notice had been issued to attend a stockholders' meeting, "to vote upon the reduction of the capital stock, and upon other matters," and that the directors had concealed from him the true condition of the company's affairs, without a knowledge of which he could not vote understandingly. *Held*, that he was entitled to the inspection: *State v. Bienville Co.*, 28 La. Ann. 204. A corporation was required by charter (in addition to general provisions of the statute upon the subject) to cause a book to be kept containing the names and residences of all stockholders, the number of shares held by each respectively, etc., such book to be at all reasonable times open for inspection of creditors and stockholders. The corporation kept no book precisely answering to the requirement of the charter; it kept, however, a transfer-book, a register of certificates of stock, and a stock ledger. On application by a stockholder for an opportunity to inspect the book prescribed to be kept by the charter, the officers of the corporation offered an inspection of the transfer-book and register, but refused to permit the stock ledger to be examined. *Held*, that the stockholder was entitled to an inspection of the stock ledger, that being, of all the books kept by the company, the one which most nearly fulfilled the requisites of the charter provision. The circumstance that it contained more facts than the charter required to be stated formed no excuse for refusing to furnish it, so long as the com-

¹ *Peckham v. Van Wagenen*, 45 N. Y. Sup. Ct. 328.

pany neglected to keep such a book as was required: *People v. Pacific Mail Steamship Co.*, 3 Abb. Pr., N. S., 364; 34 How. Pr. 193. A statute requires corporations, under a penalty, to keep the stock-book and ledger open every day except Sunday and the Fourth of July, for the inspection of stockholders and creditors. A stockholder applied to examine the books, and was told that they were locked up in the safe, and that the clerk in charge, who alone knew the combination, was not in town, but would return in a day or two, when the examination could be had. *Held*, no refusal to exhibit the books had been proved: *Kelsey v. Pfauddler Process Fermentation Co.*, 41 Hun, 20.

§ 476. Stockholders' Meetings—Notice of Time and Place Essential.—Every stockholder is entitled to reasonable notice of the time and place of holding a corporation meeting.¹ But if the charter or by-laws fix the time and place, no additional notice is necessary.² If no method of giving notice is provided by the charter or by-laws, personal notice must be given.³ If the charter or by-laws prescribe the manner of giving notice, that mode must be followed.⁴ Where the charter of a corporation declares that two weeks' published notice shall be given of the annual meetings for the election of managers, managers elected after a notice of two days only given are not elected according to law, and no by-law can render nugatory the mandatory provision of the charter.⁵ An authority given in a charter of incorporation, in general terms, to certain persons, to call the first meeting of the incorporators, does not authorize them to call such meeting at a place without the state whose legislature granted the charter.⁶ The statute relative to the observ-

¹ *People v. Batchelor*, 22 N. Y. 134; *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429; *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99; *Shelby R. R. Co. v. R. R. Co.*, 12 Bush, 62.

² *People v. Batchelor*, 22 N. Y. 128; *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534; *Warner v. Mower*, 11 Vt. 385; *Sampson v. Corporation*, 36 Me. 78; *Atlantic Ins. Co. v. Sanders*, 36 N. H. 252.

³ *Stow v. Wyse*, 9 Conn. 214; 18 Am. Dec. 99; *Harding v. Vandewater*, 40 Cal. 77; *People v. Batchelor*, 22 N. Y. 128; *State v. Ferguson*, 31 N. J. L. 107; *People Ins. Co. v. Westcott*, 14 Gray, 440; *Wiggin v. Baptist Church*, 8 Met. 301.

⁴ *Shelby etc. R. R. Co. v. R. R. Co.*, 12 Bush, 62.

⁵ *United States v. McKelden*, McAr. & Mackey, 162.

⁶ *Miller v. Ewer*, 27 Me. 509.

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ance of Sunday does not apply to the proceedings of business meetings of societies held on that day. The holding of business meetings of a benevolent society, or transacting its business on Sunday, is not forbidden as illegal.¹

ILLUSTRATIONS.—The charter of a Texas corporation purported to authorize it to transact business at Paris, France. *Held*, that the corporation could not hold stockholders' meetings outside of Texas, and that directors elected at a meeting held at Paris were not directors even *de facto*, and that their acts were a nullity: *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339. The notice of the time of holding an election of directors was for twelve o'clock, M. *Held*, that a meeting called to order, under such notice, and organized about fifteen minutes before twelve o'clock was a surprise and fraud upon many of the stockholders, and as against such of them as did not participate in the meeting, was irregular and void. Such irregularity could not be cured by a reorganization of the meeting at twelve o'clock, where such meeting was, in fact and in legal effect, but a continuation of the first meeting: *People v. R. R. Co.*, 55 Barb. 344; 7 Abb. Pr., N. S., 265; 38 How. Pr. 228. Notice was sent by mail to a director of a corporation, from the town of A, on the twentieth of the month, of a meeting of the directors to be held there on the twenty-third. *Held*, sufficient, as it appeared that a person leaving A on the morning of one day could go to B, where said notice was sent, and get back by the evening of the next: *Covett v. Rogers*, 38 Mich. 363. The stockholders of a corporation were notified that the annual meeting for the election of directors would be held at a certain hour of the day fixed by the charter, and the corporation was restrained from holding an election on that day, in consequence of which no meeting was held until several hours after the time fixed in the notice, when a small number of stockholders, without the knowledge of the others, met, organized, and adjourned until the next day, at which time an election was held by a minority of the stockholders, without notice to others who were in the vicinity for the purposes of the meeting, and might have been readily notified. *Held*, that such election was invalid, whether the restraining order did or did not bind the stockholders: *State v. Bonnell*, 35 Ohio St. 10.

§ 477. Who may Call Meetings.—A meeting of stockholders can be called only by some person having

¹ *People v. Young Men's etc. Soc.*, 65 Barb. 357.

authority to do so.¹ But the want of authority of the person calling it is waived by the stockholders attending it.² The call for the original meeting of corporators to elect directors need not be by a formal order of those authorized to make the call; it is sufficient that it is made by their direction.³ Where the charter of a corporation requires annual meetings for the election of directors, the directors cannot, by a by-law, so change the time of the annual election as to continue themselves in office more than a year, against the wishes of the holders of a majority of the stock.⁴ It is not necessary that a demand for an annual election of trustees of a corporation should be made upon the board of trustees when in session; a demand upon each individual trustee of the corporation is sufficient.⁵ Where the by-laws of a corporation provide that meetings of the stockholders shall be called by the trustees, the action of the board of trustees is necessary to convene a legal meeting; the president of the corporation has no authority to call such a meeting.⁶

ILLUSTRATIONS. — Under a statute providing "that a general meeting of the stockholders may be called at any time by the board of directors, or by any number of stockholders, holding together at least one tenth of the capital," *held*, that a call by the secretary, simply on authority of stockholders holding one tenth of the capital, was invalid, and all proceedings thereunder illegal: *Reilly v. Oglebay*, 25 W. Va. 36.

§ 478. General and Special Meetings—Distinction. —

It is not necessary to notify the stockholders of the nature of the business to be brought before a general meeting.⁷ But as to a special meeting it is, and no business can be transacted at such a meeting except as to the matters

¹ *Bethany v. Sperry*, 10 Conn. 200; *State v. Pettinelli*, 10 Nev. 141; *Johnston v. Jones*, 23 N. J. Eq. 216; *Evans v. Osgood*, 18 Me. 213; *Ste. ens v. Eden Meeting House*, 12 Vt. 688.

² *Judah v. Ins. Co.*, 4 Ind. 333; *Jones v. Turnpike Co.*, 7 Ind. 475.

³ *Hardenburg v. Farmers' and Mechanics' Bank*, 3 N. J. Eq. 68.

⁴ *Elkins v. R. R. Co.*, 36 N. J. Eq. 467.

⁵ *State v. Wright*, 10 Nev. 167.

⁶ *State v. Pettinelli*, 10 Nev. 141.

⁷ *Sampson v. Steam Mill Co.*, 36 Me. 78; *Warner v. Mower*, 11 Vt. 385.

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specified in such notice.¹ In Vermont, private business corporations, at the annual meeting, if there be no restriction in the charter or by-laws, may transact any business incident to the corporate interests.² A by-law of an insurance company, which provides that a special meeting shall be called by the president, or in his absence, by the secretary, on application made to them in writing, by ten members, does not preclude the directors from calling special meetings without such application.³ Where the by-laws of a corporation authorize the president to call special meetings of the directors, upon giving notice of the time and place thereof, and such place is not prescribed by the by-laws, the president may call such meeting at a place other than the principal place of business of the corporation.⁴

§ 479. Adjourned Meetings.—A meeting properly called to transact certain business may be adjourned to another day to finish the business, and no other notice of the adjourned meeting will be necessary.⁵

§ 480. Who have Right to Vote.—Only stockholders can vote at meetings.⁶ A vendor of shares may vote until the transfer is recorded on the stock-books.⁷ A pledgor or mortgagor may vote;⁸ so may a trustee or an

¹ *People Ins. Co. v. Westcott*, 14 Gray, 440; *In re Bridport Brewery Co.*, L. R. 2 Ch. 191; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; *Smith v. Erb*, 4 Gill. 437.

² *Warner v. Mower*, 11 Vt. 385.

³ *Citizens' Ins. Co. v. Sortwell*, 8 Allen, 217.

⁴ *Corbett v. Woodward*, 5 Saw. 403.

⁵ *Warner v. Mower*, 11 Vt. 385; *Schoff v. Bloomfield*, 8 Vt. 472; *Smith v. Law*, 21 N. Y. 296.

⁶ *Morawetz on Corporations*, sec. 360.

⁷ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 332; *Johnston v. Jones*, 23 N. J.

Eq. 228; *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429; *State v. Pettinelli*, 10 Nev. 141; *People v. Robinson*, 64 Cal. 373.

⁸ *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291; *McDaniels v. Mfg. Co.*, 22 Vt. 274; *In re Barker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525; *Scholfield v. Bank*, 2 Cranch C. C. 115. A deposit of corporate stock, made by a stockholder with the directors or their agent, to enable the stock to be voted on and to be sold, is revocable before sale: *Woodruff v. R. R. Co.*, 30 Fed. Rep. 91.

administrator.¹ The owner of all the stock of a corporation is not thereby the owner of the property.² The per-

¹ *Wilson v. Central Bridge Co.*, 9 R. I. 590; *In re Mohawk R. R. Co.*, 19 Wend. 135; *In re North Shore Ferry Co.*, 63 Barb. 556.

² *Button v. Hoffman*, 61 Wis. 20; 50 Am. Rep. 131. The court says: "From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership, the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. *Angell and Ames on Corporations*, secs. 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company, to those purposes for which the company is constituted: *Angell and Ames on Corporations*, sec. 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestuis que trust*: *Gray v. Portland Bank*, 3 Mass. 365; *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90; 4 *American Corporation Cases*, 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts: *Angell*

and *Ames on Corporations*, sec. 191; *Pope v. Brandon*, 2 Stew. 401; *Whitwell v. Warner*, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation: *Bradley v. Holdsworth*, 3 Mees. & W. 422; *Waltham Bank v. Waltham*, 10 Met. 334; *Tipets v. Walker*, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it; and even the corporation cannot divert it from such use, and a share-holder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination: *Angell and Ames on Corporations*, secs. 160, 190, 557; *Hyatt v. Allen*, 56 N. Y. 553; 15 Am. Rep. 449; 4 *American Corporation Cases*, 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same: *Wilde v. Jenkins*, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation, and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. *Angell and Ames on Corporations*, sec. 779 a. These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists, he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners

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son in whose name stock stands on the transfer-book is entitled to vote on it.¹ The owner of hypothecated stock may vote thereon.² The transfer-book is conclu-

of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate the business, and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could of course, do what several stockholders could lawfully do. It is said in *Utica v. Churchill*, 33 N. Y. 161, 'the interest of a stockholder is of a collateral nature, and is not the interest of an owner'; and in *Hyatt v. Allen*, *supra*, that 'a shareholder in a corporation has no legal title to its property or profits until a division is made.' In *Winona etc. R. R. Co. v. R. R. Co.*, 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property, and immunities. In *Baldwin v. Canfield*, 23 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett*, 14 Allen, 62, an action of replevin was brought by A, B, and C, as the 'Trustees of the Ministerial Fund in the North Parish in Haverhill,' which was the corporate name. In portions of the writ, the plaintiffs were referred to as 'the said trustees' and 'the said plaintiffs.' In the bond, 'A, B, and C, trustees as aforesaid,' became bound, and the officer in his return certified that he had taken a bond 'from the within-named A, B, and C,' and the property was receipted by 'A, B, and C, plaintiffs.' It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen v.*

Assessors, 3 Wall. 584, 'the corporation is the legal owner of all the property of the bank, both real and personal.' In *Wilde v. Jenkins*, *supra*, where a copartnership bought all the property and effects, together with the franchises of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. R. C. Bank*, 11 Paige, 118, it was held that although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. Am. Art Union*, 5 Sand. 614, it was held that 'as a general rule, the whole title, legal and equitable [to its property], is vested in the corporation itself,' and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant as a shareholder in the Art Union, for an injunction against a certain disposition of its property, was denied, because he had no interest in it. See also *Goodwin v. Hardy*, 57 Me. 143. It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself, in order to recover, and he has shown that such title is in another person."

¹ *Ex parte Willcocks*, 7 Cow. 403; 17 Am. Dec. 525; *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291.

² *Ex parte Willcocks*, 7 Cow. 403; 17 Am. Dec. 525.

sive on the right of a person to vote.¹ The fact that a pledgee of corporate stock has, without authority from the pledgor, caused it to be registered on the company's books, in his name as trustee, does not authorize him to vote thereon.² Any transfer of stock sufficient to pass the property is sufficient to entitle the transferee to vote in the election of directors, unless some specific mode of transfer is made necessary by statute or the by-laws of the company.³ A surviving partner has the right, the partnership business remaining unsettled, to vote upon corporation stock standing in the name of the firm, or which, although standing in the name of the deceased partner, is shown actually to be firm property.⁴ One to whom stock has been issued as trustee without the knowledge or consent of the owner is not a "*bona fide* stockholder," within the California code, as to qualification to vote, etc.⁵ A charter declaring that "each person being present at an election" shall be entitled to vote, means an actual and not a constructive presence.⁶ Where a holder of stock in a corporation really holds it in trust for another, but such trust does not appear on the books, and is not disclosed by the trustee, votes of the trustee on such stock, at a corporation meeting, are valid, at least where it does not appear that such votes were not in accordance with the wishes of his *cestui*, or that the latter was not content that the stock should stand in the name of the person voting, without any trust being disclosed.⁷ The right to vote at meetings of the stockholders of a corporation, on shares in its capital stock held in trust for the benefit of the corporation, is sus-

¹ In re Long Island R. R. Co., 19 Wend. 37; 32 Am. Dec. 429; State v. Harris, 3 Ark. 570; 36 Am. Dec. 460.

² McHenry v. Jewett, 26 Hun, 453.

³ People v. Devin, 17 Ill. 84.

⁴ Allen v. Hill, 16 Cal. 113.

⁵ Stewart v. Mahoney Mining Co., 54 Cal. 149.

⁶ Brown v. Commonwealth, 3 Grant Cas. 209.

⁷ Wilson v. Proprietors of Central Bridge, 5 R. I. 590.

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pended while they are so held.¹ Stock owned by the corporation cannot be voted, although held by a trustee.² The owner of stock need not have a certificate thereof, in order to entitle him to vote at an election for directors of the corporation.³ A stockholder cannot be required by the corporation to make oath, in order to determine his qualifications as a voter.⁴ When stock in a corporation is owned by two persons jointly, and they disagree as to the vote to be cast upon the shares, at an election for trustees, the vote upon such stock may be rejected.⁵ When the qualifications of persons who may vote for directors of a corporation are definitely prescribed by statute, the corporation cannot extend or limit the right to vote. A resolution of the board, declaring that a certain person is recognized as the one entitled to vote on certain stock, is inoperative, if his right cannot be established under the statute.⁶ The requirement in an act to prevent fraudulent elections by incorporated companies, which directs that a list of the stockholders entitled to vote, with the shares held by each, shall be made out ten days prior to the election, is directory only, and non-compliance with it does not of itself make void the election.⁷ Where a statute expressly declares who shall be entitled to vote for directors of a corporation, the corporation has no authority to extend or limit the right as regulated by the statute.⁸ The president has no authority, unless the charter or by-laws give it, to pass upon the right to vote. And one who, without appealing to the meeting, refrains from voting because the president denies him the right, cannot complain.⁹

¹ American R. R. Frog Co. v. Haven, 101 Mass. 398.

² Brewster v. Hartley, 37 Cal. 15; 99 Am. Dec. 237.

³ Beckett v. Houston, 32 Ind. 393.

⁴ People v. Tibbets, 4 Cow. 358; People v. Kip, 4 Cow. 382, note.

⁵ Matter of Pioneer Paper Co., 36 How. Pr. 111.

⁶ Brewster v. Hartley, 37 Cal. 15, 24; 99 Am. Dec. 237.

⁷ Downing v. Potts, 23 N. J. L. 66.

⁸ Brewster v. Hartley, 37 Cal. 15; 99 Am. Dec. 237.

⁹ State v. Chute, 34 Minn. 135.

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Voting must be personal, and not by proxy, unless permitted by the charter or statute.¹ At common law each share-holder has only one vote, no matter how many shares he holds;² but this is generally fixed by charter or statute.³ It has been held that where the charter gives no such authority, a by-law giving members a right to vote by proxy is invalid.⁴ But in other jurisdictions such a by-law has been considered valid.⁵ A proxy given by a member of a corporation for voting in the ordinary concerns of the corporation is no authority to vote for a fundamental change in or surrender of the charter of the corporation.⁶ Where by statute a stockholder, "being a citizen," is authorized to vote by proxy, such privilege cannot be claimed by an alien stockholder.⁷ Inspectors of a corporate election have no right to reject a vote offered by proxy, upon the ground that the written proxy is not acknowledged or proved by a subscribing witness. If the proxy is regular in its form, and apparently the act of the stockholder, the inspectors should receive it.⁸

ILLUSTRATIONS. — Some of the stockholders of a manufacturing company transferred four hundred shares to C., to be held by him "for the benefit of the corporation"; and at an election of officers C. voted on these four hundred shares, whereupon the election was claimed by the persons having the highest number of votes. *Held*, that a *mandamus* would issue to compel the surrender of the offices to the persons having the highest number of votes, after excluding the four hundred: *American R. R. Frog Co. v. Haven*, 101 Mass. 398; 3 Am. Rep. 377. In an election of officers one stockholder claimed to represent another as proxy, and

¹ *Philips v. Wickham*, 1 Paige, 590; *People v. Twaddell*, 18 Hun, 427; *Taylor v. Griswold*, 14 N. J. L. 222; 27 Am. Dec. 33; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; 32 Am. Rep. 417; *State v. Tudor*, 5 Day, 329; 5 Am. Dec. 162; *Brown v. Com.*, 3 Grant Cas. 209; *Com. v. Bringham*, 103 Pa. St. 134; 49 Am. Rep. 119. An injunction will not be granted in one state to restrain officers of a corporation from voting upon proxies of the stockholders at an approaching meeting in another state, upon an allega-

tion that the statutes thereof do not provide for voting by proxy: *Woodruff v. R. R. Co.*, 30 Fed. Rep. 91.

² *Taylor v. Griswold*, 14 N. J. L. 222, 237; 27 Am. Dec. 33.

³ See the statutes allowing voting by proxy cited in 27 Am. Dec. 62.

⁴ *Taylor v. Griswold*, 14 N. J. L. 222; 27 Am. Dec. 33.

⁵ *People v. Crossley*, 69 Ill. 195.

⁶ *Smith v. Smith*, 3 Desaus. Eq. 557.

⁷ *Ex parte Barker*, 6 Wend. 509.

⁸ *Matter of Cecil*, 36 How. Pr. 477.

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showed a power of attorney. He also had a letter of instructions, of which he informed the inspectors, but they, without asking to see it, rejected the proxy, on the ground that the omission of the date in the power of attorney excited their suspicions. *Held*, that the proxy should have been received: *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

§ 481. **Election of Officers.** — Where the members of a corporation are directed to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards, when the annual day has by some means, free from design or fraud, been passed by.¹ If the statute requires an annual election, the directors cannot, especially against the will of the stockholders, alter the time of the election so as materially to prolong their own term, as, for example, for fifteen months.² An election for directors of a corporation is not rendered invalid by the fact that the inspectors keep the polls open somewhat longer than the hour named in the notice; if done in the exercise of a reasonable discretion, and for the purpose of enabling stockholders present and offering to vote to do so.³ At a meeting of stockholders called to elect directors under section 3246 of the Ohio Revised Statutes, the right to choose the inspectors of election is vested in the stockholders, and not in the directors.⁴ An election of directors of an incorporated company in New York will not be set aside on the ground that the inspectors were not sworn in the form prescribed by the statute.⁵ Inspectors of an election of directors may, in their discretion, keep open the polls beyond the hour limited by the board from which they derive their authority.⁶ Where no time is limited within which the poll of an election must be held, it may be adjourned from

¹ *State v. Young*, 51 Ill. 149.

² *Curtis v. McCullough*, 3 Nev. 202.

³ *People v. R. R. Co.*, 55 Barb. 344;

7 Abb. Pr., N. S., 265; 38 How. Pr. 228.

⁴ *State v. Merchant*, 37 Ohio St. 251.

⁵ *In re Chenango Mutual Ins. Co.*,

19 Wend. 635.

⁶ *In re Mohawk R. R. Co.*, 19 Wend. 135.

day to day in the discretion of the inspectors.¹ Where a statute authorizes the choice of officers for a particular purpose, but prescribes no particular mode of making the choice, if all persons entitled to vote have an opportunity, and the officers chosen are the choice of a majority of the persons voting, the election is valid.² Where the act of incorporation does not require a majority of votes of all the corporators to elect a board of directors, a majority actually voting is sufficient to elect.³ An election of directors of a corporation by those holding less than one half of the shares, brought about by the exclusion from voting of other share-holders by an injunction issued by a competent court, is legal.⁴ Where the by-laws provide that the capital stock shall be divided into 400 shares, and that "no business shall be transacted at any meeting unless a majority of the stock is represented," it will take 201 shares to constitute a quorum for the transaction of business, although but 243 shares of the stock were ever subscribed for.⁵ A court of equity has no authority to determine the validity of the election of the officers of a private corporation, and pronounce judgment of a motion, but when the question of the validity of such an election necessarily arises in the determination of a suit properly cognizable by a court of equity, such court will determine it as it would any other question of law or fact necessary to be decided to settle the rights of the parties.⁶ It is no objection to an election that illegal votes were received,

¹ *In re Chenango Mutual Ins. Co.*, 19 Wend. 635.

² *Phillips v. Wickham*, 1 Paige, 590.

³ *Columbia etc. Co. v. Meier*, 39 Mo. 53; *State v. Wilmington*, 3 Harr. 294.

⁴ *Brown v. Pacific etc. Co.*, 5 Blatchf. 525.

⁵ *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440.

⁶ *Mechanics' Bank v. Burdett Mfg. Co.*, 32 N. J. Eq. 236. A court of chancery has no jurisdiction to deter-

mine the validity of an election of the directors of a private corporation, and whether certain persons claiming to be and acting as directors are such. The courts of law exercise jurisdiction by writ of *quo warranto*, and if there is any doubt as to the application of these remedies in New Jersey to corporations merely civil, the difficulty is obviated and supplied by the summary and efficient proceeding under the statute passed for this very purpose: *Owen v. Whitaker*, 20 N. J. Eq. 122.

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unless such votes were sufficient in number to change the majority; the mere fact that illegal votes were cast will not avoid an election.¹ Where votes rejected by inspectors at an election of directors, and which, if received, would have elected a certain ticket, are adjudged to have been erroneously rejected, the only remedy is to set aside the election.² Where the charter provides that "there shall be three directors, out of whom a president shall be chosen," the president may be elected with the other directors, without being previously elected a director himself.³ Directors who are in office cannot dispute the right of a stockholder holding a majority of the stock to have an election in accordance with the by-laws, on the ground that he intends to use his legal rights for purposes detrimental to the interests of the corporation, and that the desired election is merely a step toward that end.⁴ An agreement among some of the share-holders, who together own a majority of the stock, that all will vote for certain directors, in the belief they will, if elected, manage the affairs in a certain way, or to hold their shares and sell only together, is not unlawful or contrary to public policy.⁵ The officers of a corporation elected for a year hold over until others are elected.⁶ If an election for managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first.⁷ The acts of a person elected as a director, though not possessing the charter qualifications, are valid as to third persons, if his election appears of record, and

¹ Sudbury v. Stearns, 21 Pick. 148; Ex parte Murphy, 7 Cow. 153.

⁵ Havemeyer v. Havemeyer, 43 N. Y. Sup. Ct. 505; Faulds v. Yates, 57 Ill. 416.

² Matter of Long Island R. R. Co., 19 Wend. 37; 32 Am. Dec. 429.

⁶ Trustees v. Hills, 6 Cow. 23; 16 Am. Dec. 429.

³ Currie v. Mut. Ass'n Soc., 4 Hen. & M. 315; 4 Am. Dec. 517.

⁷ Commonwealth v. Smith, 45 Pa. St. 59.

⁴ Camden etc. R. R. Co. v. Elkins, 37 N. J. Eq. 273.

he has been permitted by the corporation to act as director.¹ If the clerk of a corporation is present when a vote approving his election is taken, and he himself records the vote, his acceptance of the office will be presumed.² The records of a corporation showing the election at an annual meeting of a certain person as director, and his presence and making motions at a subsequent meeting of the directors, are admissible as *prima facie* evidence, though not conclusive of his acceptance of the office, in an action of tort brought by him against a sheriff for levying an execution against the corporation on his property as a director.³ Where an officer of a corporation is required to be chosen by ballot, and the record of his election does not specify the mode, the legal presumption is that he was chosen by ballot.⁴

ILLUSTRATIONS.—The Pennsylvania constitution of 1874 provided "that in all elections for directors or managers of a corporation each member or share-holder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer." *Held*, more than directory, and not to require any legislative action to make it effective: *Peirce v. Commonwealth*, 104 Pa. St. 150. By the by-laws of an incorporated hospital, an election for governors was required to be held on a certain day in each year; but by the neglect of the officers no election was had for several years. *Held*, that a *mandamus* would be issued to compel an election within sixty days from the time fixed in the by-laws, without proof of any demand that an election be held: *People v. Albany Hospital*, 61 Barb. 397. A, owning certain shares in a corporation, gave them to his son, with the request that new certificates should be issued in the son's name, and transferred upon the books of the company. This request was complied with. The son paid nothing for the stock, the transfer being made in order that he might be eligible to the office of trustee. *Held*, on a review of the statutes of Nevada, that such transaction constituted the son a stockholder, and made him eligible to such office: *State v. Leete*, 16 Nev. 242. The power of election was vested in a board of directors, who were accustomed to elect their cashier

¹ *Dispatch Line v. Bellamy Co.*, 12 N. H. 205; 37 Am. Dec. 203.

² *Delano v. Charities*, 138 Mass. 63.

³ *Blake v. Bayley*, 82 Mass. 531.

⁴ *Blanchard v. Dow*, 32 Mo. 557.

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annually, according to a resolution to that effect, but the charter provided that before he entered upon the duties of his office he should give bond. *Held*, that the term of office did not expire at the end of the year, but that the old cashier continued in office until a new one was qualified by giving a bond: *Sparks v. Farmers' Bank*, 3 Del. Ch. 274. A lough stock with his wife's money as an investment for her, but the certificate was accidentally made out to him. At first he ordered it to be changed, but afterwards concluded to take the stock himself, and countermanded the order, and transferred the cost from his wife's account to his own. *Held*, a bona fide holder of stock, and eligible as director: *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529. A statute authorizes any person who "may be aggrieved by or may complain of any election" of directors of a corporation to make application to the supreme court to compel a new election. *Held*, that this provision of law could not be invoked by one who was not a stockholder at the time of the election complained of, and who received his stock from one of the authors of the wrong complained of: *In re Syracuse etc. R. R. Co.*, 91 N. Y. 1.

§ 482. Power of Majority to Make By-laws.—The corporation by a majority of its members has an implied authority to make by-laws for the government of the concern.¹ The power to enact by-laws does not reside in the board of directors, but in the aggregate body of the stockholders. A by-law, adopted at a meeting of all the stockholders, cannot be avoided because the meeting is designated on the records as a meeting of the board of directors.² But by-laws must be reasonable,³ and not contrary to law, morals, or public policy.⁴ A member of a corporation is presumed to know its by-laws,⁵ and is bound by the articles of corporation and by-laws, whether he signed them or not.⁶ A by-law is a rule or law of a corporation for its government, and is a legislative act,

¹ Morawetz on Corporations, sec. 366. Stockholders who, at a meeting, do not vote when they might are bound by the result: *State v. Chute*, 34 Minn. 135.

² *State Sav. Ass'n v. Nixon-Jones Printing Co.*, 25 Mo. App. 642.

³ *Palmetto Lodge v. Hubbell*, 2 S.rob. 457; 49 Am. Dec. 604. Whether

a by-law is reasonable is to be decided by the court: *Commonwealth v. Worcester*, 3 Pick. 473; *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671.

⁴ *Sayre v. Louisville Ben. Soc.*, 1 Duvall, 143; 85 Am. Dec. 613.

⁵ *Palmyra v. Morton*, 25 Mo. 593.

⁶ *McFadden v. Los Angeles Co.*, 74 Cal. 571.

2 Mass. 531.
32 Mo. 557.

and the solemnities and sanction required by the charter must be observed. A resolution is not necessarily a by-law, though a by-law may be in the form of a resolution.¹ Corporations must show their power to pass by-laws, and bring themselves by proof within that power.² The legislature cannot confer on a moneyed corporation power to enact a by-law contravening, repealing, or in any wise changing the statutory or common law of the land.³ The by-laws of a corporation, made in pursuance of their charter, are equally as binding on all their members, and others acquainted with their method of business, as any public law of the state.⁴ The facts that the by-laws of a corporation express an individual liability of members for company debts, and that each member subscribed the by-laws merely to become a member, are not enough to sustain an action by a creditor of the company against a member for the amount due. The office of a by-law is to regulate the duties of members towards the corporation and among themselves. A third party can enforce them only when he shows some privity; as where his claim is for value advanced upon the credit of the by-law and the signatures, or the like.⁵ A by-law may be good in part, and void for the rest.⁶ But it cannot be made to operate retrospectively.⁷ A power conferred by the charter of a private corporation to repeal a by-law cannot be exercised to impair any rights that have become vested by virtue of the by-law.⁸

¹ *Drake v. R. R. Co.*, 7 Barb. 508.

² *Dunham v. Trustees of Rochester*, 5 Cow. 462; *Taylor v. Griswold*, 14 N. J. L. 223; 27 Am. Dec. 33.

³ *Seneca County Bank v. Lamb*, 26 Barb. 595. In *Goddard v. St. Louis Merchants' Exchange*, 78 Mo. 609, the court held valid a by-law of a board of trade that "on all sales of grain in bulk on elevator receipt, the buyer shall pay the first ten days' storage, unless otherwise specified at the time

of sale," although the common-law rule in such cases would be different.

⁴ *Cummings v. Webster*, 43 Me. 192; *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *Brick Presbyterian Church v. Mayor etc. of New York*, 5 Cow. 538; *McDermott v. Board of Police*, 5 Abb. Pr. 422.

⁵ *Flint v. Pierce*, 99 Mass. 68.

⁶ *Rogers v. Jones*, 1 Wend. 237.

⁷ *Howard v. Savannah*, T. U. P. Charl. 173.

⁸ *Kent v. Mining Co.*, 73 N. Y. 159.

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§ 483. **By-laws Held Valid.**—All by-laws which carry into effect the objects of the corporation are valid.¹ So are by-laws regulating the manner of holding meetings and electing officers,² regulating the manner of transferring shares;³ a by-law prohibiting tickets to be counted at an election on which there was anything besides the names of the candidates,⁴ authorizing stockholders to vote by proxy;⁵ a by-law which prescribes a trial of the members of the corporation for any delinquencies, before a select number of members appointed by the president, and presided over by him, without the right of appeal, and confines the evidence to such as may be brought by members only, and prescribes that members shall be dropped without trial, if fines imposed by said by-laws are not paid.⁶ A by-law of the New York board of underwriters,—a corporation chartered to establish and maintain uniformity in insurance,—requiring members to follow uniform rates of insurance, is valid.⁷ One who, by becoming a member of the New York Stock Exchange, agrees that his seat may be disposed of among his creditors in the exchange in a certain manner, is bound by his agreement.⁸ A board of trade, which is an association of persons for their own convenience merely, may decide among what outside persons its telegraphic reports may be distributed.⁹ A corporation may, for their own security, make a by-law requiring their clerk to be sworn, but cannot avail themselves of his omission to take the oath in defense of an action against them.¹⁰ The by-laws of the Chicago Board

¹ *People v. Sailor's Snug Harbor*, 54 Barb. 532; *Came v. Brigham*, 39 Me. 35; *State v. Tudor*, 5 Day, 329; 5 Am. Dec. 162.

² *Kearney v. Andrews*, 10 N. J. Eq. 70.

³ *Morawetz on Corporations*, sec. 366.

⁴ *Com. v. Woelper*, 3 Serg. & R. 29; 8 Am. Dec. 629.

⁵ *State v. Tudor*, 5 Day, 329; 5 Am. Dec. 162.

⁶ *Hussey v. Gallagher*, 61 Ga. 86.

⁷ *People v. New York Board of Underwriters*, 54 How. Pr. 228.

⁸ *Weston v. Ives*, 97 N. Y. 222.

⁹ *Marine Grain and Stock Exchange v. Western Union Telegraph Co.*, 22 Fed. Rep. 23; *Met. etc. Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847.

¹⁰ *Hastings v. Blue Hill Turnpike*, 9 Pick. 80.

of Trade, authorizing the board of directors to expel a member found guilty of "any act of dishonesty," does not contravene any principle of natural justice as a wrongful forfeiture, nor the charter (Ill. Acts, 1859, sec. 6), allowing expulsions by the corporation "in manner prescribed by the rules, regulations, and by-laws thereof." "Manner" embraces both method and mode.¹

ILLUSTRATIONS.—A member of the Philadelphia Stock Exchange who subscribed to its constitution and by-laws, *held*, bound by an amendment made in accordance therewith, providing for a gratuity fund from which payments were to be made to the representatives of deceased members, who should pay dues and assessments prescribed, and providing that members failing to pay such dues and assessments should be debarred from participation in the benefits from the fund; the representatives of a member thus failing to pay could not be heard to question the validity of the amendment, and could receive no benefit from the fund: *MacDowell v. Ackley*, 93 Pa. St. 277. In an action brought against a suspended member, by a corporate lodge of Odd Fellows, for arrears due by him, it appeared that such member, on his admission to the lodge, had signed the constitution and by-laws, and thereby agreed to support the same, and to pay all legal demands against him so long as he should continue a member of the lodge. *Held*, that by suspension the defendant did not cease to be a member, and that, while a member, he continued liable by law, and by his express undertaking to pay the contributions which the by-laws required: *Palmetto Lodge v. Hubbell*, 2 Strob. 457.

§ 484. By Laws Held Invalid.—A by-law contrary to the intent or the provisions of the charter is void;² so is a by-law in violation of common law or statutes.³ These by-laws have been held invalid, viz.: A by-law in restraint of trade;⁴ a by-law requiring the members to bring suit only in a certain county;⁵ a by-law requiring members to submit their disputes to arbitration;⁶ curtail-

¹ *Pitcher v. Chicago Board of Trade*, 20 Ill. App. 319.

² *Martin v. Nashville etc. Ass'n*, 2 Cold. 418; *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Curtis*, 9 Nev. 325.

³ *Seneca Co. Bank v. Lamb*, 26 Barb. 595.

⁴ *Sayre v. Louisville etc. Ass'n*, 1 Duvall, 144.

⁵ *Nute v. Hamilton Mut. Ins.*, 6 Gray, 174; *Amesbury v. Ins. Co.*, 6 Gray, 506.

⁶ *State v. Union Merchants' Exchange Co.*, 2 Mo. App. 96.

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ing the rights of members to vote;¹ a by-law prohibiting the transfer of stock, except at the office of the company, personally or by attorney, and with the assent of the president;² a by-law providing that membership is to be forfeited upon enlistment in the army or navy;³ a by-law of a benevolent association providing, as a penalty for the non-payment of dues, that the delinquent should forfeit his right to any benefits while in arrears, and for a period of three months after the payment of arrears.⁴ A by-law which requires the consent of all the stockholders to a transfer of the stock of one of them is void as against public policy; nor does it matter that the stockholder who objects to the enforcement of the by-law originally voted for it.⁵

ILLUSTRATIONS.—A volunteer fire company, upon the creation of a paid fire department, ceased to run to fires, converted its effects into cash, and leased its engine-house. Some months afterwards the by-laws were amended, changing the rate of dues from twelve and one half cents to two dollars per month. A, a member, did not consent to the increase of dues, and did not pay them, for which reason his name was erased from the books. In a proceeding by *mandamus* at his relation, held, that the amendment to the by-laws was unreasonable, and that upon a dissolution of the company, and a distribution of its property among its members, A was entitled to his share as a member: *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264.

§ 485. Corporation must Sue for Injuries to Itself—Individual Stockholders cannot Sue for It.—For wrongs or injuries to a corporation the agents of the corporation must sue, acting for it. A stockholder or stockholders cannot bring any suit or proceeding on behalf of the corporation, unless the corporation refuses to proceed itself, on account of the misconduct or failure of its agents.⁶ A

¹ *St. Luke's Church v. Mathews*, 4 Desaus. Eq. 578; 6 Am. Dec. 619.

² *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306.

³ *In re Rev. David Mulholland Ben. Soc. of Manayunk*, 10 Phila. 19.

⁴ *Cartan v. Father Matthew etc. Soc.*, 3 Daly, 20.

⁵ *In re Klaus*, 67 Wis. 401.

⁶ *Russell v. Wakefield Co.*, L. R. 20 Eq. 479; *Hersey v. Veazie*, 24 Mo. 9; 41 Am. Dec. 365; *Robinson v. Smith*,

stockholder in a corporation, the directors of which have been guilty of mismanagement and neglect of duty, by which the value of the stock has become depreciated, cannot bring suit in his own behalf to recover damages for himself personally.¹ The general rule is, that a suit brought for the purpose of compelling the ministerial officers or agents of a private corporation to account, or for misconduct, must be in the name of the corporation itself, and cannot be maintained in the name of an individual stockholder.² A stockholder cannot enjoin a levy and sale upon the foreclosure of a mortgage, executed by the officers of his corporation, without showing some sufficient reason why the corporation is not the complainant.³ Where a corporation by a valid contract acquires a majority of the stock of another corporation, share-holders in the latter corporation have no standing in court to restrain the acts of the directors of the former corporation, it not appearing that they have unsuccessfully tried within the corporation to get what they want, or that their interests are betrayed or jeopardized. It is not enough that the former corporation is violating its contract.⁴ A bill cannot be maintained by the stockholders of a corporation against its officers for conduct prejudicial to the corporation, to which the corporation is not made a party, and in which no reason was given why the relief sought might not be had through the

3 Paige, 233; *Allen v. R. R. Co.*, 49 How. Pr. 14; *Memphis City v. Dean*, 8 Wall. 73; *Kennebec R. R. Co. v. R. R. Co.*, 54 Me. 181; *Smith v. Hurd*, 12 Met. 372; 46 Am. Dec. 690; *Brown v. Van Dyke*, 8 N. J. Eq. 795; 55 Am. Dec. 250; *Arkenberg v. Wood*, 23 Barb. 363; *Baltimore etc. R. R. Co. v. Wheeling*, 13 Gratt. 40; *Allen v. Curtis*, 26 Conn. 456; *Silk Co. v. Campbell*, 27 N. J. L. 539; *Dimpfell v. R. R. Co.*, 110 U. S. 209; *Smith v. Poor*, 49 Me. 415; 63 Am. Dec. 672; *Bradley v. Richardson*, 2 Blatchf. 343; *Insane Hospital v. Higgins*, 15 Ill.

185; *Campbell v. Brunk*, 25 Ill. 225; *Hay v. McCoy*, 6 Blackf. 69; *Trustees of Lexington v. McConnell*, 3 A. K. Marsh. 224; *Mauney v. Motz*, 4 Ired. Eq. 195; *Porter v. Neckervis*, 4 Rand. 359. Corporation is trustee for its stockholders: *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586; *Caulkin v. Gas Light Co.*, 85 Tenn. 683; 4 Am. St. Rep. 786.

¹ *Evans v. Brandon*, 53 Tex. 56.

² *Brown v. Van Dyke*, 8 N. J. Eq. 795.

³ *Henry v. Elder*, 63 Ga. 347.

⁴ *Converse v. Dimock*, 22 Fed. Rep. 573.

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machinery of the corporation, or in its name.¹ If an individual stockholder has suffered damage on a contract with the corporation, through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation. He can maintain no action against the directors, who are themselves liable to the corporation.² A refusal by the directors of a bank to commence a suit to test the question of the legality of a tax upon the property of the bank is not a breach of their duty for which a bill will lie against them at the suit of a stockholder.³ Stockholders of a corporation cannot maintain an action accruing to the corporation for breach of contract, and which its officers and directors refuse to bring.⁴ The commission of a fraud upon a corporation by its officers does not give to a creditor an action at law for fraud and deceit against them.⁵ The request made by corporators to the directors to bring an action must have been made in good faith, and not have been simulated to serve as the foundation of a suit by the corporators.⁶ A bill in equity to enforce performance of public duty by a corporation cannot be maintained by a private person in the absence of a special right or authority; nor in such a case has the complainant a right to a decree compensating him for any damage suffered.⁷ That a stockholder has been refused permission to examine the books of the corporation with the assistance of an expert, his bill charging no fraud or misconduct, but alleging his desire to discover whether he has been defrauded by the directors of the assets, presents no ground of equitable jurisdiction; his remedy is at law by *mandamus*.⁸

v. Brunk, 25 Ill. 225;
6 Blackf. 69; *Trustees*
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¹ *Black v. Huggins*, 2 Tenn. Ch. 780.

⁵ *Priest v. White*, 89 Mo. 609.

² *Smith v. Poor*, 40 Me. 415; 7 Am. Dec. 672.

⁶ *Bacon v. Irvine*, 70 Cal. 221.

³ *Dodge v. Woolsey*, 18 How. 331; *Mech. etc. Bank v. Debolt*, 18 How. 380; *Same v. Thomas*, 18 How. 384.

⁷ *Buck Mountain Co. v. Lehigh Coal etc. Co.*, 50 Pa. St. 91; 88 Am. Dec. 534.

⁴ *Slattery v. Transportation Co.*, 91 Mo. 217; 60 Am. Rep. 245.

⁸ *Stettauer v. New York etc. Construction Co.*, 42 N. J. Eq. 46.

ILLUSTRATIONS.—In an action on a note, defendant pleaded that certain shares of stock in a corporation of which plaintiff was an officer were delivered as security for the note; that by plaintiff's negligence and misconduct as such officer the stock subsequently greatly depreciated in value, to defendant's damage. *Held*, that this defense was not available, as it would in effect be an action against a corporate officer by a stockholder, to hold him responsible for his official misconduct, without request and refusal of the corporation to bring the action: *Palmer v. Hawes*, 73 Wis. 46.

§ 486. When Stockholders Entitled to Relief.—But where the managing agents of the corporation are doing wrong, and wrongfully refuse to bring suit, in the name of the corporation, then at the suit of a stockholder the courts will give relief. "A stockholder is entitled to relief in a court of equity on account of an injury to his equitable rights as member and beneficiary of a corporation, provided, firstly, that the corporation be unable, by reason of the default of its agents, to obtain an adequate remedy within a reasonable time; and secondly, that the right to obtain redress for the injury be not impliedly relinquished by the stockholders to the discretion of the regular agents of the corporation as a mutual concession for the sake of peace and good government."¹ A corpora-

¹ Morawetz on Corporations, sec. 400; *Taylor v. Miami Exporting Co.*, 5 Ohio, 162; 22 Am. Dec. 785; *Dodge v. Woolsey*, 18 How. 331; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Mussina v. Goldthwaite*, 34 Tex. 125; 7 Am. Rep. 281; *March v. R. R. Co.*, 40 N. H. 548; 77 Am. Dec. 733; *Hawes v. Oakland*, 104 U. S. 450, the court saying: "We understand the doctrine to be, that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit, some action, or threatened action, of the managing board of directors or trustees of the corporation, which is beyond the authority con-

ferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other share-holders, as will result in serious injury to the corporation, or to the interests of the other share-holders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other share-holders; or where the majority of share-holders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other share-holders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to pre-

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tor whose membership has been denied by the corporation may sue the corporation to establish his right thereto.¹ Where the majority of the stockholders are illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other stockholders, and which can only be restrained by a court of equity, an action to obtain equitable relief may be maintained by an aggrieved stockholder, or those whose rights are thus affected may join as plaintiffs in the action.² A stockholder may file a bill in chancery to restrain the officers of the company from the commission of an unauthorized act.³ A minority of the stockholders have a remedy in chancery against the directors and against the corporation, and against all others, whether individuals or corporations, assisting or confederating with them, to prevent such corporation, and the directors thereof, from making any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, if the acts intended to be done create what in law is denominated a breach of trust or duty.⁴ A stockholder may bring suit in his own name, for himself,

vent irremediable injury or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the share-holder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part. If time permits, or has permitted, he must show, if he fails with the directors, that he has made

an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a cause, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors and of the share-holders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a share-holder at the time of the transactions of which he complains, or that his shares have devolved on him since, by operation of law."

¹ *Tipton Fire Co. v. Barnheisel*, 92 Ind. 88.

² *Barr v. R. R. Co.*, 96 N. Y. 444.

³ *Bliss v. Anderson*, 31 Ala. 612; *Neall v. Hill*, 16 Cal. 145.

⁴ *March v. R. R. Co.*, 40 N. H. 548; 77 Am. Dec. 733.

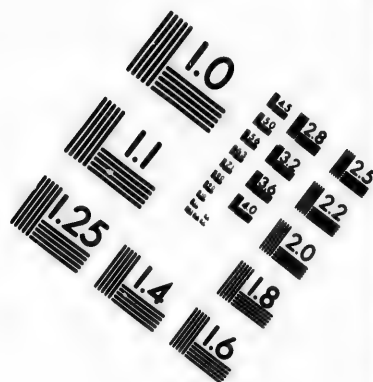
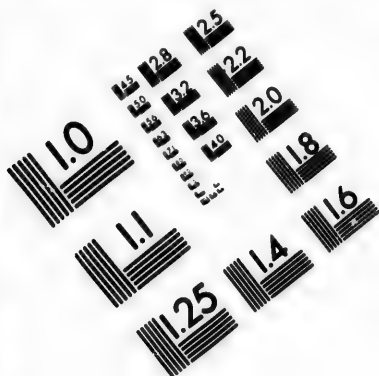
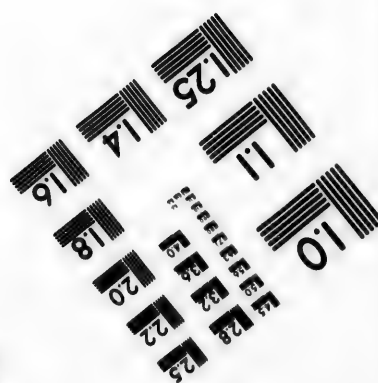
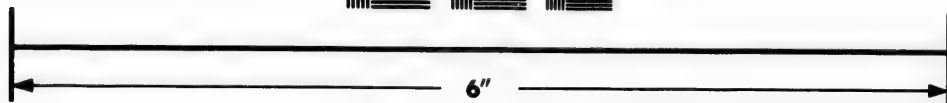
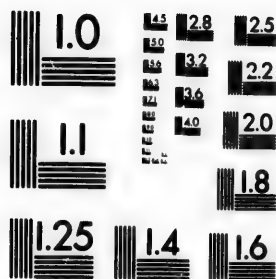


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and others similarly situated, to recover the property of the corporation which one of its trustees has converted to his own use, where the corporation has declined to bring the action; and in such a case the corporation is properly made a party defendant.¹ A stockholder has a remedy in chancery against the directors to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty. So, also, a stockholder has a remedy against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law.² A stockholder of an insolvent corporation may bring suit for a rescission of an unlawful contract, without first demanding that the corporation shall sue, if it is apparent that the corporation could not act because its directors are under the control of the persons with whom the contract was made.³ Where the officers and directors have improperly exercised their powers in making contracts, and in using the company's money, and have the control of the company, the stockholders may sue in equity for redress, making said officers and directors defendants, together with the corporation.⁴ To constitute an illegal application of the funds or money of a corporation, it is not necessary that there should be any intentional wrong or actual fraud; and to give the court jurisdiction in equity in such a case, the plaintiff need not allege or prove any such actual and willful fraud or collusion on the part of the company or companies, or the directors thereof.⁵

¹ *Carpenter v. Roberts*, 56 How. Pr. 218.

² *Wilcox v. Bickel*, 11 Neb. 154.

³ *Currier v. R. R. Co.*, 35 Hun, 355.

⁴ *Deaderick v. Wilson*, 8 Baxt. 108.

⁵ *March v. R. R. Co.*, 43 N. H. 515.

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A stockholder may maintain a bill against the corporation to restrain them from paying a tax illegally levied upon the property of the company, the state treasurer being made a party defendant to the bill, and enjoined from collecting the tax.¹ Stockholders may bring suit to cancel a deed purporting to have been made by the corporation, as a cloud on the title of the corporation.² Where the officers have wasted its funds, a share-holder desiring redress need not, before resorting to the courts, make a demand, which necessarily would be unavailing, on the officers to bring suit.³ Where a stockholder brings suit to obtain redress for grievances common to others, and to vindicate the rights of the corporation, he must show that he has made an earnest, not a simulated, effort to obtain redress within the corporation, and where time has permitted, that he has endeavored to induce the stockholders, as a body, to take action. He must also show that he was a share-holder at the time of the transactions complained of, or that his shares have since devolved on him, not by purchase, but by operation of law; and his bill must disclose his efforts to obtain redress in the ordinary mode.⁴ Where a stockholder brings a suit in equity, which should have been brought by the corporation, his bill must set forth in detail the efforts made by him to secure, on the part of the corporation, the desired action, or it will be dismissed.⁵ A stockholder may maintain an action to set aside an election of directors, although at the time of the election no stock had stood in his name on the books of the corporation sufficiently long to entitle him to vote.⁶ A court of equity will enforce assessments on unpaid subscriptions necessary to pay creditors, if the

¹ *Dodge v. Woolsey*, 18 How. 331; *Mechanics' and Traders' Bank v. Deboit*, 18 How. 380; *Mechanics' and Traders' Bank v. Thomas*, 18 How. 384.

² *Baldwin v. Canfield*, 26 Minn. 43.

³ *Kelsey v. Sargent*, 40 Hun, 150.

⁴ *Dannmeyer v. Coleman*, 8 Saw. 51.

⁵ *Foot v. Cunard Mining Co.*, 17 Fed. Rep. 46.

⁶ *Wright v. Central California Colony Water Co.*, 67 Cal. 532.

⁷ 35 Hun, 355.
on, 8 Baxt. 108.
43 N. H. 515.

directors refuse to act.¹ Where a corporation has ceased to appoint officers, and has abandoned its business, a stockholder may bring suit for himself and the others for the protection of their rights, without a showing of a refusal of corporate officers to act.² Stockholders may maintain a bill, to which the corporation is party defendant, against the remaining stockholders who have a majority of the stock, and constitute a majority of the directors, where the bill charges such directors with fraudulently combining to appropriate the funds of the corporation for their individual benefit, destroying the business, and depreciating the stock, improperly withdrawing the funds of the corporation, concealing their amount, and refusing to permit it to be charged on the books, or to permit suits to be brought for its recovery, and threatening to sell the corporation property for less than its value, and to waste and destroy it for their individual benefit, and praying for a disclosure and an account, the payment of whatever may be due to the corporation, and an injunction against selling or wasting its property.³

ILLUSTRATIONS.—A number of shares of the stock of a turnpike company being about to be sold, the officers of the company appointed an agent to buy them, for the "use of the company"; but when purchased, they took a part of them to themselves. A stockholder instituted a suit against them to recover the damages he sustained by the course taken. *Held*, that he could recover: *Kimmel v. Stoner*, 18 Pa. St. 155. By state statute, a street-railroad company's charter was repealed, and its franchises and track transferred to another, and the company refused to seek a remedy. *Held*, that a stockholder asking for an injunction, on the ground that the statute impaired the obligation of a contract, had a standing in equity: *Greenwood v. Freight Co.*, 105 U. S. 13. Plaintiff and others, having owned and worked for some years a mining claim, incorporated themselves, and turned their interests into shares of corporate stock. Plaintiff failed to pay a stock assessment, and the corporation sold his share at public auction; he then sued

¹ *Glenn v. Semple*, 80 Ala. 159.

² *Sears v. Hotchkiss*, 25 Conn. 171;

³ *Crumlish v. R. R. Co.*, 28 W. Va. 65 Am. Dec. 557.
623.

has ceased business, and the others for the purpose of a re-organization may maintain a suit as defendant, a majority of the stockholders, where the stock is not fully paid up, and the combination for their protection and depreciation of funds of the corporation, refusing to permit suits to be brought, or to sell the stock, and to waste the funds, and praying for an injunction of whatever nature against the corporation.

of a turn-over of the company, "use of the stock of them to the detriment of the stockholders." *Held*, St. 155. By the repeal of the act, and the stockholder's statute imposing in equity: the others, having him, incorporated shares of corporation, and he then sued

for his undivided proportion of the claim. *Held*, that he could maintain suit to recover his stock if the sale had been improper, but could not sue the corporation for a specific interest in the corporate property: *Smith v. Maine Boys etc. Co.*, 18 Cal. 611. In a suit by a stockholder against a corporation of which he was a member, the declaration alleged a conversion and misapplication of money by the corporation and its president, and that the latter kept false books of account, and refused to pay over money rightly due plaintiff. *Held*, that a sufficient cause of action had been stated, without alleging that the corporation had refused to bring suit: *Brown v. R. R. Co.*, 27 Hun, 342. In a suit by a stockholder of a corporation to restrain it from illegally furnishing water to a city, plaintiff alleged simply that he requested the directors to desist, and that they refused. Five days after the refusal he brought suit. *Held*, that there was no such action or fraud on the part of the corporation, or the majority of its directors, or injury to plaintiff's interest, apparent on the face of his allegations, as to entitle him to equitable relief: *Hawes v. Oakland*, 104 U. S. 450; *Huntingdon v. Palmer*, 104 U. S. 482. A corporation having forfeited its property, two of the three directors voted against bringing any suit enjoining defendant from taking possession, alleging, as ground for their action, that they feared they could not obtain justice in the state courts. The third director, a non-resident, was willing to trust the local courts. Upon suit brought in the United States court by him the next day after the vote, *held*, that the refusal was not so clearly real and persistent as to give him authority to sue on behalf of the corporation: *Detroit v. Dean*, 106 U. S. 537.

§ 487. Discretionary Powers of Officers will not be Interfered with at Suit of Stockholders.—The court will not, as a rule, interfere with the discretion of the officers in acting within the powers given them, so long as they act honestly.¹ The action of the officers of an incorporated company, without any violation of the charter or constitution of the company, cannot be disregarded or controlled by any court at the instance of a stockholder, unless it is shown to have been a willful abuse of their discretion, or the result of bad faith, or of a willful neglect or breach of a known duty.² Only in cases of aggravated miscon-

¹ Morawetz on Corporations, secs. 387, 388; *Dudley v. Kentucky High School*, 9 Bush, 573; *Hedges v. Paquet*, 3 Or. 77; *Samuel v. Holladay*,

1 Woolw. 400; *Chetlain v. Republic etc. Ins. Co.*, 86 Ill. 220.

² *Smith v. Prattville Mfg. Co.*, 29 Ala. 503.

duct will equity interfere with the acts of corporate officers.¹ Equity will not, by injunction at the suit of a stockholder in a business corporation, interfere with the general management of the corporation property,—such as the mode of investing its surplus moneys,—unless there be a clear violation of express law, or a wide departure from charter powers.² The directors of a railroad will not be enjoined from doing acts within their powers, such as making contracts with connecting roads, and selling stock of another road owned by the company, at the suit of one holding a majority of the stock, because they are hostile to him, unless some dishonest purpose is shown.³ But any one dissenting stockholder may restrain the company from executing a contract which exceeds its powers.⁴

ILLUSTRATIONS. — In an action for fraud against a corporation, wherein the declaration alleged that, in order to carry out the fraud an unnecessary assessment was levied, but did not allege that the assessment was in excess of the powers of the directors, *held*, that as to the wisdom or necessity of an assessment, or the motives which prompted it, the court would not inquire: *Oglesby v. Attrell*, 105 U. S. 605. A corporation voted to increase its capital stock two thousand shares out of its surplus earnings. The increase was for a special object, though not so stated in the vote, and the object immediately thereafter failed, whereupon the vote was rescinded before action taken under the former vote. A stockholder, with knowledge of the foregoing facts, a year later brought a suit in equity to compel an issue to him of stock, upon the basis of the vote before mentioned. Important transactions had intervened, and stock changed hands on the basis of the unincreased capital. *Held*, that the mere vote to increase gave the petitioner no vested interest, and that the company had power to rescind its vote, and that the petitioner, by his laches and acquiescence for so long a time, had lost whatever equity he might have had: *Terry v. Eagle Lock Co.*, 47 Conn. 141.

§ 488. **Stockholders' Bill — Who may or must be Complainants.** — The holder of a single share may bring

¹ *Cicotte v. Anciaux*, 53 Mich. 227.

² *Bach v. Pacific Mail Steamship Co.*, 12 Abb. Fr., N. S., 373.

³ *Elkins v. R. R. Co.*, 36 N. J. Eq. 241.

⁴ *Zabriskie v. R. R. Co.*, 23 How. 381.

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suit,¹ or all the share-holders may join as complainants.² It has been held that a person who has purchased shares for the simple purpose of bringing suit cannot bring the action.³ The liability of stockholders for the debts of a corporation, contracted before the whole capital stock has been paid in, cannot be enforced by a single creditor suing on his own behalf. The bill must be brought in behalf of all creditors, and the assets of the corporation must first have been exhausted.⁴ Where any fraud has been perpetrated by the director of a company, by which the property or interest of the stockholders is affected, they have a right to come in as parties to a suit against the company, and ask that their property shall be relieved from the effect of such fraud.⁵

§ 489. **Who may or must be Defendants.**—The defendants in a bill by a stockholder to protect his interests in a corporation should be, first, the corporation itself;⁶ and secondly, all other persons against whom relief is sought.⁷ A stockholder, not being personally liable, is not a proper party in an action against the corporation.⁸

§ 490. **Corporators or Share-holders not Liable Personally on Corporate Contracts.**—If the corporation was not in legal existence at the time, or if the contract made with a corporation legally in existence is not enforceable against it, either because it was *ultra vires* the corporation

¹ *Seaton v. Grant*, L. R. 2 Ch. 462; *Armstrong v. Church Soc.*, 13 Grant Ch. 556; *Zabriskie v. R. R. Co.*, 23 How. 395; *Dodge v. Woolsey*, 18 How. 331; *Gifford v. R. R. Co.*, 10 N. J. Eq. 171.

² *Robinson v. Smith*, 3 Paige, 232; *Peabody v. Flint*, 6 Allen, 57; *Rogers v. Lafayette Agr. Works*, 52 Ind. 297; *Whitney v. Mayo*, 15 Ill. 251.

³ *Sparhawk v. R. R. Co.*, 54 Pa. St. 401.

⁴ *Harper v. Union Mfg. Co.*, 100 Ill. 225.

⁵ *Bayliss v. R. R. Co.*, 8 Biss. 193.

⁶ *Davenport v. Dows*, 18 Wall. 626; *Greaves v. Gouge*, 69 N. Y. 154; *Charleston Ins. Co. v. Sebring*, 5 Rich. Eq. 342; *Deaderick v. Wilson*, 8 Baxt. 108.

⁷ *Morawetz on Corporations*, sec. 411; *Hare v. R. R. Co.*, 1 Johns. & H. 252; *Taylor v. Maimi Co.*, 5 Ohio, 162; 22 Am. Dec. 785.

⁸ *Adams v. Bank*, 1 Mo. 361; 10 Am. Dec. 88.

or beyond the authority of the agent, the members of the corporation cannot be charged personally, either jointly or severally.¹ The stockholders in a corporation are not liable as such, either on account of any misrepresentations made by the company before incorporation, or for the non-disclosure of the company's indebtedness, on its application for a charter.² But incorporators are individually liable for money illegally received by the corporation, where the corporation is but a cloak for the purpose of covering up the gaming transactions contemplated in its organization and done as a business.³

ILLUSTRATIONS.—The directors of a bank agreed to buy the stock of A, a stockholder for the bank. The bank had no power to purchase the stock. *Held*, that the directors were not personally liable to A: *Abeles v. Cochran*, 22 Kan. 405; 31 Am. Rep. 194. A colored man was ejected from an omnibus by the driver, receiving injuries. The omnibus was owned and run by a corporation, and suit was brought against certain of the stockholders for the tort of the omnibus driver. No evidence was introduced to show any participation in the act on the part of the defendants. *Held*, that there could be no recovery: *Peck v. Cooper*, 8 Ill. App. 403.

§ 491. Stockholders not Personally Liable for Debts, etc., of Corporation.—The stockholders of a corporation are not personally liable for its debts, unless made so by statute.⁴ A by-law of a corporation will not suffice to create liability for corporation debts upon a member or officer, unless the member signs it and money is lent upon the credit thereof.⁵ When neither the charter of a corporation nor any general statute imposes on the individual

¹ *Fay v. Noble*, 7 Cush. 188; *Trowbridge v. Scudder*, 11 Cush. 83; *First Nat. Bank v. Almy*, 117 Mass. 476; *Blanchard v. Kaull*, 44 Cal. 440; *contra*, *Hill v. Beach*, 12 N. J. Eq. 31; *Hess v. Werts*, 4 Serg. & R. 356.

² *Matthewes v. Stanford*, 17 Ga. 543.

³ *McGrew v. Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771.

⁴ *Thompson on Stock and Stock-*

holders, sec. 4; *Morawetz on Corporations*, sec. 559; *Freeland v. McCullough*, 1 Denio, 414; 43 Am. Dec. 685; *Salt Lake City Bank v. Hendrickson*, 40 N. J. L. 52; *Norton v. Hodges*, 100 Mass. 241; *Lowry v. Inman*, 46 N. Y. 119; *Pollard v. Bailey*, 20 Wall. 527; *Shaw v. Boylan*, 16 Ind. 384.

⁵ *Flint v. Pierce*, 99 Mass. 68; 96 Am. Dec. 691.

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members a liability to pay its debts, such liability cannot be imposed by a by-law of the corporation.¹ But stockholders in a corporation which has failed to comply with the requirements of the law necessary to render their property exempt from corporate debts are primarily liable for such debts, and may be sued without the property of the corporation being first exhausted.² To render the individuals of a corporation personally liable for its debts on account of fraud, creditors must show that they were induced to become creditors by something said or done by its members, amounting to the perpetration of deceit upon them.³

§ 492. Capital Stock a Trust Fund for Payment of Creditors.—But the capital stock of a corporation is a trust fund for the payment of creditors.⁴ The unpaid subscriptions are a trust fund for all the creditors, and cannot be attached by a judgment creditor.⁵

ILLUSTRATIONS.—A railroad company, being indebted to a construction company in the sum of seventy thousand dollars, which it could not pay, issued to the members of the construction company, in satisfaction, certificates of its stock of the face value of three hundred and fifty thousand dollars. *Held*, that

¹ *Trustees of Free Schools in Andover v. Flint*, 13 Met. 539; *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98.

² *Marshall v. Harris*, 55 Iowa, 182.

³ *Sisson v. Matthews*, 20 Ga. 848.

⁴ *Story's Eq. Jur.*, sec. 1252; *Wood v. Dummer*, 3 Mason, 308; *Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 9; *Baker v. Atlas Bank*, 9 Met. 192; *Mumma v. Potomac Co.*, 8 Pet. 286; *Curran v. Arkansas*, 15 How. 304; *Tarbell v. Page*, 24 Ill. 46; *Ogilvie v. Knox Ins. Co.*, 22 How. 387; *Payson v. Stoevers*, 2 Dill. 431; *Sawyer v. Hoag*, 17 Wall. 610; *Burke v. Smith*, 16 Wall. 390; *New Albany v. Burke*, 11 Wall. 96; *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Robinson v. Carey*, 8 Ga. 530; *Reid v. Eatonton Co.*, 4 Ga. 102; *Schley v. Dixon*, 24 Ga. 273; 71 Am. Dec. 121; *Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 395; *Mann v. Pents*, 3

N. Y. 422; *Hurd v. Tallman*, 60 Barb. 272; *Bank of St. Marys v. Powers*, 25 Ala. 612; *Currey v. Woodward*, 53 Ala. 375; *Smith v. Huckabee*, 53 Ala. 195; *Paschall v. Whitsett*, 11 Ala. 472; *Allen v. R. R. Co.*, 11 Ala. 437; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; *Adler v. Milwaukee Patent Brick Co.*, 13 Wis. 57; *Miers v. Zanesville, Co.*, 11 Ohio, 274; 13 Ohio, 197; *Henry v. R. R. Co.*, 17 Ohio, 187; *Moss v. Burroughs*, 1 Wood, 467; *Payne v. Bullard*, 23 Miss. 90; 55 Am. Dec. 74; *Tinkham v. Borst*, 31 Barb. 407; *Hastings v. Drew*, 76 N. Y. 9; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Rider v. Morrison*, 54 Me. 429; *Shickle v. Watts*, 94 Mo. 410; *Thompson v. Reno Savings Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; and see note to this case in 3 Am. St. Rep. 806-873.

⁵ *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 168.

the receivers were liable as stockholders to creditors of the railroad company, for the remaining eighty per cent of the par value: *Jackson v. Traer*, 64 Iowa, 469; 52 Am. Rep. 449. A corporation whose capital was impaired bought in its own stock through an agent. The seller did not know who the purchaser was. *Held*, that the seller was liable to a creditor of the corporation: *Crandall v. Lincoln*, 52 Conn. 73; 52 Am. Rep. 560. A private corporation, the stockholders of which were not individually responsible for its debts, increased its stock under authority of its charter, and subscriptions to such new stock were made upon the agreement, set forth in the subscription paper, that no assessment should be made, and that each subscriber was to pay only ten dollars per share for such new stock, the par value of which was one hundred dollars per share. *Held*, that this provision was void as against creditors of the corporation without notice of it, and that such creditors could enforce payment for such stock to the extent of their demands: *Union Mutual Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537; 37 Am. Rep. 129. A, by his bond, acknowledged the receipt from an insurance company of ten shares of its capital stock, and agreed to pay two hundred dollars therefor in installments,—one fourth on receipt of the stock certificate, and the remainder in three equal amounts, at three, six, and nine months from January 7, 1871, the date of the bond. He paid, on executing it, twenty-five dollars, and his name was entered as a stockholder on the books of the company. The certificate was not delivered or demanded. In 1872 the company became bankrupt. *Held*, that the assignee was entitled to recover of A the unpaid installments: *Hawley v. Upton*, 102 U. S. 314. An insurance company had been officially reported as unsound, and proceedings to wind up its affairs were to be instituted. The directors, being aware of these facts, passed a resolve that all stockholders who would pay five per cent on their stock (on which ninety per cent was unpaid), and surrender their certificates to the company, should have the privilege of retiring and withdrawing the notes which they had given for their stock. Had all the stockholders done this, the company would have had funds enough to pay about one half of its ascertained liabilities, without making any provision for its outstanding policies. *Held*, that this resolve was a fraud upon the company's creditors, in law if not in fact, and as against them it afforded no protection to the stockholders who had availed themselves of it: *Gill v. Balis*, 72 Mo. 424.

§ 493. Shares must be Paid for in Money or Money's Worth.—Shares of stock must be paid for in money or

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money's worth. Paid-up stock may be lawfully issued in payment of indebtedness due and payable,¹ or in payment for property purchased by the corporation.² Subscriptions of stock to a corporation, organized to carry on an iron furnace, may be paid in coal lands, iron lands, and other property necessary for the business, if such property is taken at its real value, and the transactions are in good faith.³ In the absence of any showing of fraudulent representation or concealment, the fact that securities given by a party to a corporation in payment of a subscription to stock prove to be of no value, does not invalidate the certificates issued and delivered.⁴ Stock issued by a corporation to a creditor, in satisfaction of a debt due, is paid-up stock, and such stockholder is not liable to a creditor of the corporation as unpaid stock. Where stock is issued for a sum less than the par value thereof, a creditor of the corporation may recover the difference from the stockholder.⁵ While unpaid installments on stock ordinarily

¹ Van Cott v. Van Brunt, 82 N. Y. 535. Power conferred by charter upon directors to decide time, manner, and proportions in which the stockholders shall pay for their respective shares, authorizes them to give a subscriber credit: Blunt v. Walker, 11 Wis. 334; 78 Am. Dec. 710.

² Brant v. Ehlen, 59 Md. 1; East N. Y. R. R. Co. v. Lighthall, 6 Rob. (N. Y.) 407; Phelan v. Hazard, 5 Dill. 45; Coit v. N. C. Gold Amalgamating Co., 14 Fed. Rep. 12; Peck v. Coalfield Coal Co., 11 Brad. (Ill.) 88; Schenck v. Andrews, 57 N. Y. 133; Carr v. Le Fevre, 27 Pa. St. 413. In Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 213, shares of stock in a bridge company were given to a newspaper in consideration of articles to be published in the paper advocating the enterprise. This was held to be "paid-up" stock. Said the court: "The authorities are not in entire accord as to whether the payment of a stock subscription can be made in anything else than money, some holding one way and some the other. But the class of authorities which declare that a subscription may

be paid otherwise than in money, we regard as asserting a more reasonable doctrine,—a doctrine better adapted to the practical affairs of business life. Regarding the matter, then, in this light, we shall rule that payment of stock subscriptions need not be in cash, but may be in whatever, considering the situation of the corporation, represents to that corporation a fair, just, lawful, and needed equivalent for the money subscribed. Any other doctrine than this would, as it seems to us, place a corporation at a disadvantage, under a disability not contemplated by the law, and under which a natural person does not labor. Besides, a corporation, unless prohibited by statutory provisions, has a general capacity of contracting, which the common law concedes to every one ordinarily competent to enter into binding engagements."

³ Searight v. Payne, 6 Lea, 283.

⁴ Protection Life Ins. Co. v. Osgood, 93 Ill. 69.

⁵ Kehler v. Lademann, 11 Mo. App. 550.

constitute a trust fund for the payment of the corporate debts, yet where stock has been issued to a stockholder and settled for by him, under an arrangement made in good faith with the company, it is not in the power of a creditor, in all cases, and as a matter of right, to disturb the arrangement so made, on the ground that, in the light of subsequent events, it was a disadvantageous one, and especially where such creditor knew of the transaction at the time, and acquiesced in it.¹ Where a stockholder executed to the company his note and mortgage in payment of his stock subscription, the stock must be regarded as paid in, and the note and mortgage as given for money loaned or invested by the company. The liability of the stockholder on the note and mortgage is no less than that of any other borrower; nor do his rights as a stockholder stand on any better footing than those who paid for their stock, but borrowed nothing from the company.²

ILLUSTRATIONS.—Stockholders were allowed to pay their subscriptions by conveying, or causing to be conveyed, to the corporation coal-lands, the business of the corporation being to mine coal and to buy and sell coal-lands, and the value thereof was *bona fide* fixed at five hundred thousand dollars, the whole amount of the capital stock, although the land cost only fifty-seven thousand dollars when bought from the farmers. *Held*, that they were not liable as upon unpaid stock for the debts of the corporation: *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88. Certain stock in a company was sold at par. A note was given for the price payable out of the net receipts or earnings of the stock, to be paid quarterly by the company. The note contained a condition that the principal should become due upon failure to pay the installments regularly. *Held*, that, under the circumstances, the transaction amounted to a valid sale: *Dean v. Nelson*, 10 Wall. 158. After the owners of mining property had organized themselves into a corporation, they contracted with the directors, they being the directors, whereby they conveyed the property to the corporation, and received as payment full-paid stock. This contract was never impeached. *Held*, that a creditor of the corporation, which had become insolvent, could not show that the said stock had never been paid for, in whole

¹ *Coit v. North Carolina Gold Amalgamating Co.*, 14 Fed. Rep. 12.

² *Union Central Life Ins. Co. v. Curtis*, 35 Ohio St. 343.

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or in part, so as to hold the stockholders liable for his debt: *Phelan v. Hazard*, 5 Dill. 45. In an action to recover from defendant a debt of a manufacturing corporation, on the ground that the capital stock had not been fully paid in, it appeared that defendant had signed the articles of incorporation, had subscribed for stock, was a trustee and secretary of the corporation, and actively engaged in its management, and that his name was recorded in the corporation books as a stockholder. *Held*, that he was a stockholder, although he had neither paid for his stock nor received a certificate for it: *Wheeler v. Millar*, 90 N. Y. 353.

§ 494. **When Property, etc., cannot be Taken in Payment of Shares.**—Where property has no actual, positive, and ascertainable value, it seems that it cannot lawfully be accepted in payment of stock.¹ Where paid-up stock is issued for services to be performed,² or in payment of indebtedness not yet due,³ the person receiving it becomes liable for its par value. Where nominally paid-up stock is issued without consideration, either as a bribe or a present, the person who receives it becomes liable to creditors for its par value.⁴ A secret agreement with a company, that a stock subscription of defendant was merely to be colorable, is a fraud upon other subscribers for stock, and is not a defense.⁵ One who takes capital stock from the corporation, paying no consideration therefor, cannot avoid his responsibility to creditors of the corporation, on the ground that he is the holder of full-paid stock.⁶ Payment by a stockholder to a firm of which he was a member, of a sum equal to the amount of his stock, to satisfy a debt due from the corporation to the firm, will not extinguish his liability as stockholder to other creditors of the corporation.⁷ Transfer of patent rights of unascertained value cannot be deemed payment of a subscription

¹ *Tasker v. Wallace*, 6 Daly, 364. & *J. 372; Crawford v. Rohrer*, 59 Md.
² *Barnes v. Brown*, 11 Hun, 315; 599.
Andress's Case, L. R. 8 Ch. Div. 126. ⁵ *Downie v. White*, 12 Wis. 176; 78
³ *Appleyard's Case*, 49 L. J. Ch. Am. Dec. 731.
290. ⁶ *A. Wight Co. v. Steinkemeyer*, 6
⁴ *Everman v. Kriekhaus*, 7 Mo. Mo. App. 574.
App. 455; *Ex parte Daniell*, 1 DeGex ⁷ *Buchanan v. Meissner*, 105 Ill. 638.

to the stock of a railroad company such as will satisfy the statute.¹ Notwithstanding stock in a corporation has been issued as full-paid stock, but in payment for property taken by agreement instead of money for the use of the company, yet, upon proof that the property was not of value commensurate with the stock, and that the arrangement was collusively made, a receiver can maintain a suit to compel the stockholder to contribute the amount unpaid towards the demands of creditors.² Where the charter of a corporation authorizes capital stock to be paid for in property instead of in cash, creditors cannot complain because this is done, if it is done in good faith and without fraud.³

§ 495. Rights of Creditors to Unpaid Assessments by Share-holders.—Therefore when any share-holder has not paid up his share in full, he holds the balance as a trustee for the creditors of the corporation,⁴ and if the corporation becomes insolvent, and its assets exhausted before a member has paid for his shares, a court of equity will interpose and compel him to make such payment for the benefit of creditors. Unless he has paid, he must pay; and the court will entertain a bill for discovery to compel the corporation or its members to disclose whether they have paid or not,⁵ and will put aside and discharge all sham devices and secret agreements not to pay, or not to pay in full, or to pay in something other than money or money's worth.⁶ The obligation to make good unpaid

¹ *Tasker v. Wallace*, 6 Daly, 364.

² *Van Cott v. Van Brunt*, 2 Abb. N. C. 283.

³ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343.

⁴ *Adler v. Patent Brick Co.*, 13 Wis. 60. But stockholders are liable to creditors only to the extent of their unpaid subscriptions: *Warfield v. Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532.

⁵ *Miers v. Zanesville Co.*, 11 Ohio, 273; *Middletown Bank v. Russ*, 3 Conn. 135; *Bogardus v. Rosendale Man. Co.*, 7 N. Y. 147.

⁶ *Mann v. Cooke*, 20 Conn. 179, 187; *Robinson v. R. R. Co.*, 32 Pa. St. 334; *Graff v. R. R. Co.*, 31 Pa. St. 489; *New Albany etc. R. R. Co. v. Fields*, 10 Ind. 187; *New Albany etc. R. R. Co. v. Slaughter*, 10 Ind. 218; *Downie v. White*, 12 Wis. 176; 78 Am. Dec. 731; *Blodgett v. Morrill*, 20 Vt. 509; Na-

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portions of capital stock when necessities of creditors require it is a charge upon the stock, which passes with it to the transferees thereof, subject to exceptional instances, where the original subscribers are not withstanding liable by charters or general statutory provisions.¹ A bill in equity by a creditor will lie to compel a stockholder to pay arrears on stock, though by the statutes of the state an ample remedy is provided.² Before the dissolution of a corporation, a court of equity, not a court of law, is the proper forum for a suit by a judgment creditor of the corporation to enforce the liability of a share-holder on his unpaid subscriptions.³ Creditors of an incorporated company, who have exhausted their remedy at law, can, in order to obtain satisfaction of their judgment, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties, and although, by the terms of their subscriptions, the stockholders were to pay for their shares "as called for" by the company, and the latter had not called for more than thirty per cent of the subscriptions.⁴ A stockholder cannot decrease his number of shares after debts have accrued.⁵ A resolution permitting stockholders on payment of thirty per cent on their shares to forfeit them is void as against creditors.⁶ The word "non-assessable" upon the certificate of stock does not cancel or impair the obligation to pay the amount due upon the shares created

than *v. Whitlock*, 9 Paige, 152; *Noble v. Callender*, 20 Ohio St. 199; *Henry v. R. R. Co.*, 17 Ohio 187; *Haviland v. Chace*, 39 Barb. 283. The presumption is, that a certificate of stock in the usual form is full paid, and a purchaser who takes it without notice is not liable to creditors if the company's representations that the stock is full paid were false: *Johnson v. Tullman*, 88 Mo. 567.

¹ *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532.

² *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74.

³ *Brown v. Fisk*, 23 Fed. Rep. 228.

⁴ *Hatch v. Dana*, 101 U. S. 205.

⁵ *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74.

⁶ *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273.

by the acceptance and holding of such certificate. At most, its legal effect is a stipulation against liability from further assessment or taxation after the entire subscription of one hundred per cent shall have been paid.¹

ILLUSTRATIONS. — The general law under which a corporation was organized declared: "No stockholder shall ever be held liable for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him." The charter prescribed in what installments forty per cent of the stock should be paid, and then declared: "The balance on each share, or any portion of such balance, shall not be called for unless with the assent of three fourths of the stockholders, and then only to increase the business of the corporation." *Held*, that after the payment of forty per cent of his stock, no stockholder was liable for the balance, unless it had been called for by a vote of three fourths of the stockholders: *Louisiana Paper Co. v. Waples*, 3 Woods, 34. One subscribed for the capital stock of a corporation, under a parol promise by the agent who procured the subscription that the subscriber should not be called upon to pay for the stock or respond to any assessments. *Held*, that he was nevertheless bound: *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286. Certain stockholders of a corporation took some of its first-mortgage bonds, and in return received stock issued by the corporation, of which forty per cent was credited as paid. *Held*, that said stockholders were liable to the extent of this forty per cent to the creditors of the corporation: *Skramka v. Allen*, 7 Mo. App. 434; 76 Mo. 384. Subscribers to the stock of a corporation paid twenty per cent of the shares, and received full-paid certificates, with an agreement by the company that no further assessments should be made thereon. *Held*, that this agreement was void as to creditors, who are entitled to consider the stock subscribed as a trust fund for their payment: *Scovill v. Thayer*, 105 U. S. 143. A corporation in 1871 reduced its capital stock, of which twenty-four per cent only had been paid in, and issued paid-up certificates based upon the new valuation. Afterwards the corporation became bankrupt, and the assignee paid a forty-per-cent dividend to creditors generally from assets realized upon, without calling on the stockholders. *Held*, that as to debts contracted before the reduction of the capital stock in 1871, the stockholders of that date were liable beyond the amount of their twenty-four-per-cent payment; but that as to debts afterwards contracted, those stockholders were to be con-

¹ *Upton v. Tribilcock*, 91 U. S. 45.

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sidered as having paid up their subscriptions, but that they should take no benefit from the forty-per-cent payment by the assignee, as this should have been made primarily to creditors who could not resort to the liabilities of the stockholders: *In re State Ins. Co.*, 14 Fed. Rep. 28. The charter of a railroad company provided that five per cent on each share should be paid when subscribed, and subsequent payments be made upon calls. The stockholders voted that no further calls be made; that certificates issue for stock to the extent to which payment had been made, and that the balance of the subscription be canceled. This vote was carried out while the company was solvent. Seven years after, when the company was bankrupt and practically dissolved, certain of its creditors sought to make the parties released liable as stockholders for unpaid subscriptions. Held, that said parties had been released from all such liability: *Steacy v. R. R. Co.*, 5 Dill. 348. A railroad corporation was insolvent, and its stock was worthless. The corporation owed G., and in good faith transferred to him, in payment of the debt, the unissued stock at twenty cents on the dollar. Held, that notwithstanding the Iowa statute, G. was not liable to creditors of the corporation for the remaining eighty cents: *Clark v. Bever*, 31 Fed. Rep. 670. A corporation transferred shares of its stock and its bonds to the defendant gratuitously. The defendant sold the bonds. None of the property of the corporation had been applied in the payment of the bonds. Held, that a creditor of the corporation could not compel the defendant to pay for the stock, or account for the bonds: *Christenson v. Eno*, 106 N. Y. 97; 60 Am. Rep. 429.

§ 496. Personal Liability of Stockholders by Statute. —

But in some states, by statute stockholders have been made personally liable for the debts of the corporation.¹ Under the New York statutes, the receiver of a corporation may bring separate actions against each stockholder to collect unpaid subscriptions.² Fraud must be established to authorize the recovery of damages against members of a corporation under the Iowa code. The statute does not give a right of action for negligence or mismanagement.³

¹ *Mokelumne etc. Co. v. Woodbury*, 14 Cal. 265; *Gray v. Coffin*, 9 Cush. 192; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 539; *Com. Bank v. Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688. A corporation cannot, unless authorized by charter or statute, impose a

personal liability upon its stockholders: *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98; 2 Am. Rep. 562.

² *Van Wagenen v. Clark*, 22 Hun, 497.

³ *Hoffman v. Dickey*, 54 Iowa, 135.

Under a statute providing that all stockholders of corporations shall be individually liable to the creditors of the company to the amount of unpaid stock held by them, that the creditor who sues is also a stockholder does not, under the statute, make any difference, provided he has paid in full for the stock held by him, and consequently is not individually liable for the debts of the company.¹

A receiver of a corporation organized under the New York general manufacturing act is not vested with the right of action given by that act to creditors of the corporation to enforce their liabilities against the stockholders. This right is conferred only upon such creditors as are within the prescribed conditions, and for their personal benefit.²

Where a statute makes each stockholder liable for the debts of a company, each stockholder at the time the debt was contracted is meant.³ The liability of a stockholder for the debt of a corporation may be enforced by action against his executors, although the debt accrues after the stockholder's death.⁴ If one subscribes for stock in the name of minors, for the purpose of avoiding personal responsibility if the corporation should become insolvent, and receives the benefit of the stock, he will be liable for the corporate debts.⁵ The liability of a stockholder, under a charter making each liable to the corporation creditors "to the amount of his stock, and no more," is not affected by the fact of his having paid to the corporation the full amount of his stock subscription.⁶ A clause of the constitution providing for the personal liability of stockholders of corporations may be waived by the insertion of a stipulation to that effect in all the contracts of the corporations.⁷ In Iowa, before any stockholder can be charged with the payment of a

¹ *Smith v. Londoner*, 5 Col. 365.

² *Farnsworth v. Wood*, 91 N. Y. 308.

³ *Moss v. Oakley*, 2 Hill, 265.

⁴ *Manville v. Edgar*, 8 Mo. App. 324.

⁵ *Castleman v. Holmes*, 4 J. J. Marsh.

⁶ *Roman v. Fry*, 5 J. J. Marsh. 634.

⁷ *Lewis v. St. Charles County*, 5 Mo. App. 225.

⁸ *French v. Teschemaker*, 24 Cal. 518.

judgment rendered against a corporation of which he is a stockholder, a proceeding by ordinary action must be instituted against him, and his liability determined therein.¹ Stockholders in a banking corporation are only personally liable, or their individual property chargeable, for the debts of the corporation to the extent and as prescribed by the charter. By becoming stockholders, they assent to the terms and assume the liabilities imposed by the act creating the corporation. The obligations thus assumed are created by the charter, and cannot be extended by implication beyond the terms of that instrument reasonably interpreted. If a general personal liability is created, it may be enforced by a personal action, as other personal obligations are enforced. If the charter merely permits the individual property of stockholders to be levied upon and taken in execution on a judgment against the corporation in a given contingency, and provides that the same process may be used and enforced by the stockholders whose property is first taken, against the property of the other stockholders, so as to compel a ratable contribution by all, no general individual liability is created for which a personal action can be brought. In such case the creditor of the corporation is confined to the remedy against the stockholders, and their individual property given by the act.² Where a stockholder was induced to take the stock by the false representations of the president of the corporation, that it was full-paid capital stock, on which was no liability of stockholders, it was held to be no defense in an action by judgment creditors of the corporation on his statutory liability.³ Where by the charter of a bank stockholders are "bound respectively for all the debts of the bank *in proportion* to their stock holden therein," one creditor cannot sue a stockholder at law (there being numerous

¹ Bayliss v. Swift, 40 Iowa, 648.

² Lowry v. Inman, 46 N. Y. 119.

³ Briggs v. Cornwell, 9 Daly, 436.

other creditors) to recover the full amount of his debt, without regard to those other creditors, or to the ability of the other stockholders to respond to their obligations under the charter, and so appropriate to himself the entire benefit of that stockholder's security, and exclude all other creditors from it. He should proceed in equity, where the proportion can be ascertained upon an account taken of debts and stock, and a *pro rata* distribution of the debts among the several stockholders.¹ Where by statute a stockholder is liable to creditors to double the amount of his stock, each stockholder is severally liable to any creditor.² A receiver of "all the estate, property, and equitable interest" of an insolvent banking corporation created by the state of Illinois cannot enforce against a stockholder in the corporation the liability imposed by the statute of Illinois on each stockholder for double the amount of his stock, such liability being one in favor of creditors of the bank, and not in favor of the corporation.³ A creditor of a corporation, who can also resort to stockholders, has not two funds in such a sense as to be compelled to resort first to the stockholders at the suit of a corporation creditor who has no recourse against the stockholders, because the stockholders are not common debtors.⁴

ILLUSTRATIONS.—A bank charter provided that stockholders "shall be individually liable to the amount of their stock for all the debts of the corporation." *Held*, 1. That the liability reaches to the nominal value of the stock, and not merely to the unpaid balance on stock subscriptions; 2. That the stockholder is liable, although he was not a stockholder when the creditor's cause of action accrued: *Bank v. Sinnock*, 120 Ill. 350; 60 Am. Rep. 558. The charter of a corporation provides that "each stockholder shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding ten per cent of the par value of the share or shares held by him." *Held*, that a

¹ Pollard v. Bailey, 20 Wall. 520.

² Jacobson v. Allen, 20 Blatchf. 525.

³ McCarthy v. Lavasche, 89 Ill. 270;
31 Am. Rep. 83.

⁴ Carter v. Neal, 24 Ga. 346; 71 Am.
Dec. 138.

creditor may bring his individual action at law against one of the stockholders to recover his debt to the extent of ten per cent of the par value of the defendant's shares: *Hall v. Klink*, 25 S. C. 348; 60 Am. Rep. 505.

§ 497. Construction of Such Statutes.—Statutes rendering a stockholder personally liable, it is held in some courts, should be liberally construed;¹ in other courts it is held that such statutes should be strictly construed;² and again in other courts it is said that they should be reasonably construed.³ A statute which provides that the directors of any corporation (except banking companies) shall be liable for its debts in excess of its capital stock, applies only to debts voluntarily created by the directors, and does not include a judgment against the corporation for damages for loss of a steamboat through the negligence of its agents.⁴ Where a statute makes stockholders personally liable to the holder of bills drawn on the corporation and refused payment by the corporation, only such stockholders and their successors as were members when the payment was refused are liable.⁵ A subscriber for stock in a corporation who has paid part of his subscription, but whose stock is afterwards forfeited by the company for non-payment of calls, is not a stockholder within the meaning of the New York statute, making each stockholder in any company formed under the act liable to its creditors "to an amount equal to the amount of unpaid stock held by him," until the stock so held by him shall have been paid up. The forfeiture relieves the subscriber from all liability to the company for the unpaid subscription, and he ceases to be a stockholder

¹ *Carver v. Braintree Mfg. Co.*, 2 Story, 432; *Freeland v. McCollough*, 1 Denio, 414; 43 Am. Dec. 685.

² *Lowry v. Inman*, 46 N. Y. 119; *Chase v. Lord*, 77 N. Y. 1; *Moyer v. Slate Co.*, 71 Pa. St. 293; *Means's Appeal*, 85 Pa. St. 75; *Gray v. Coffin*, 9 Cush. 192; *Salt Lake Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Irvine v. McKeon*, 23 Cal. 472.

³ *Mokelumne Hill Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 505.

⁴ *Cable v. Gaty*, 34 Mo. 573.

⁵ *Bond v. Appleton*, 8 Mass. 472; 5 Am. Dec. 111.

within the meaning of the statute.¹ The summary remedy provided by the Missouri Revised Statutes, against stockholders of a corporation against which an execution has been obtained, cannot be maintained against the administrator of a deceased stockholder.² A judgment against the corporation for waste is an "indebtedness" for which a stockholder is liable.³ The liability of a corporation for the infringement of letters patent is not, before judgment, a "debt" for which under a statute the officers are personally liable.⁴ A street railway is a railroad corporation, under a statute imposing only single liability on the stockholders of "all existing railroad corporations."⁵ The individual liability of a stockholder for a debt of the corporation may be released by a cancellation of the stock by the corporation before the creation of the debt, the issue having been on the pretense that a stock dividend had been earned when such was not the fact.⁶ A judgment creditor of a corporation, after execution returned unsatisfied, may sue in equity for himself, and for such other creditors as may join him making the corporation, and such of its delinquent stockholders as are within the jurisdiction, defendants, and may have an account taken, and an order compelling payment by such stockholders; and this notwithstanding that a state statute provides a remedy at law against an individual stockholder to enforce contribution. If such stockholders are liable to the full amount of their unpaid subscriptions, an assessment before suit is unnecessary.⁷ A demand against a corporation for damages for loss of a steamboat through the negligence of its agents is not a "debt" of the corporation for which the stockholders are jointly and severally liable, under a statute providing that the stockholders are jointly and severally

¹ *Mills v. Stewart*, 41 N. Y. 384.

² *Cummings v. Wright*, 11 Mo. App. 348.

³ *Powell v. R. R.*, 36 Fed. Rep. 728.

⁴ *Child v. Boston Iron Works*, 137 Mass. 516; 50 Am. Rep. 328.

⁵ *Jerman v. Benton*, 79 Mo. 148.

⁶ *Hollingshead v. Woodward*, 35 Hun, 410.

⁷ *Holmes v. Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725.

liable if the corporation fails to give notice annually of all the "existing debts" of the corporation.¹ A creditor of a corporation which was established in New York, under the statute of that state which provides that stockholders and officers shall be personally liable as a penalty in certain contingencies, cannot maintain his action in Massachusetts to enforce his claim personally against a stockholder or officer of the corporation.² A statute providing that if the indebtedness of a mining company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for such excess, applies only to the unpaid creditors, to the making of whose debts the directors assented, and directors are not liable to creditors to whose debts they did not assent, although such debts were incurred to pay off former illegal indebtedness to which they had assented.³ A notice of an application for an execution against a stockholder on a judgment against a corporation confers no jurisdiction of the person if served personally without the state.⁴

ILLUSTRATIONS.—A Missouri statute exempted from liability for corporate debts all persons holding stock in a corporation as collateral security, but treated the persons pledging such stock as holding the same, making them liable therefor. *Held*, that persons to whom a corporation pledged its stock as collateral security were exempt: *Burgess v. Seligman*, 107 U. S. 20. A corporation became insolvent pending the settlement of the estate of a stockholder whose stock was only half paid up at the time of his death. No call was made on him or on his executor. *Held*, that after settlement and distribution, a creditor of the corporation could not maintain an action against the executor, who was legatee and devisee as well: *Larkin v. Willi*, 12 Mo. App. 135. A corporation gave a trust deed to S. to secure the payment of first-mortgage bonds, and also issued paid-up stock to be held by S. for one year, that he might control the corporation, and secure the payment of interest on

¹ *Cable v. McCune*, 26 Mo. 371; 72 Am. Dec. 214.

² *Allison v. R. R. Co.*, Tenn., 1888

³ *Wilson v. Seligman*, 36 Fed. Rep

⁴ *Halsey v. McLean*, 12 Allen, 439; 154 90 Am. Dec. 157.

the bonds; the stock-book showed that S. was a stockholder, and the transfer-book that he held the stock in escrow. *Held*, that S. was not liable to one who became a creditor of the corporation before S. assumed the rights of a stockholder by voting: *Fisher v. Seligman*, 7 Mo. App. 383. The charter of a corporation contained this clause: "Each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer," etc. The corporation having become insolvent, A, a creditor, brought an action against B, one of the stockholders, in which he sought to hold him responsible for the debt to the amount of the stock held by him. *Held*, that B could not set up the unconstitutionality of the charter in defense, and that under the above clause, the stockholders were severally and individually liable: *McCarthy v. Lavasche*, 89 Ill. 270. A statute provides that where execution against a corporation cannot be satisfied on the corporate property, it may be levied on the property of the stockholders to the extent of their shares, but only upon an order from the court in which the action has been brought, and upon motion after notice to the stockholders. *Held*, that the stockholder's liability depended upon the amount of shares held at the return of the execution, and not at the time of making the motion: *Skrainka v. Allen*, 76 Mo. 384. A statute provides that every stockholder of any company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid of the stock held by him, for all debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company. *Held*, that a stockholder could offset any demand he had against the company: *Jerman v. Benton*, 79 Mo. 148. The statutory requirement to make stockholders liable personally, that a demand shall be made on the corporation, that it may pay the debt or expose property to attachment, *held*, met by a demand by letter on the treasurer, who told the creditor he could not pay the debt, and did not expose any property: *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363. Iowa Code, section 1072, makes stockholders liable when corporate funds have been diverted to payments of dividends, leaving insufficient funds to meet the liabilities. *Held*, that the word "funds" means resources, and not merely cash on hand, and that the word "liabilities" does not include the capital stock of the corporation: *Miller v. Bradish*, 69 Iowa, 278. A bank charter made the stockholders individually liable "to make good losses to depositors or others." *Held*, that the stockholders were liable to all creditors suffering from the failure of the bank to pay its debts: *Queenan v. Palmer*, 117 Ill. 619.

§ 498. **Nature of Personal Liability.**—The liability of stockholders under such statutes is not that of guarantors, but is an original liability like that of partners or members of an unincorporated association.¹ The stockholders are liable for the corporate debts as if there had been no incorporation, except that the liability is suspended until the assets of the corporation have been exhausted.² But a few cases deny this doctrine, and hold that the liability of the stockholder is secondary and collateral, and like that of a guarantor.³ Creditors of a corporation seeking to recover from a stockholder on his individual liability must first show that they have exhausted their remedy against the corporation.⁴ A stockholder is not liable to an execution creditor unless such stockholder be in default to the corporation.⁵ A creditor of a corporation organized under the general manufacturing act cannot proceed against a stockholder for the debt until he has obtained judgment against the corporation, and an execution has been returned unsatisfied.⁶ A stockholder who is also a creditor of the corporation cannot enforce the personal liability of the stockholders for his debt, and one to whom he has assigned his claim for the sole purpose of enforcing such liability stands in no better position.⁷ A stockholder who under the charter of a corporation is personally liable for its debts cannot, by buying up at a discount debts

¹ *Green v. Beekman*, 59 Cal. 547; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Conklin v. Furman*, 8 Abb. Pr., N. S., 164; *Clark v. Myers*, 11 Hun, 609; *Moss v. Averill*, 10 N. Y. 459; *Jones v. Barlow*, 62 N. Y. 210; *Wiles v. Suydam*, 64 N. Y. 176; *Chase v. Lord*, 77 N. Y. 33; *Southmayd v. Russ*, 3 Conn. 52; *Planters' Bank v. Billingsville*, 10 Rich. 95. The liability of members for the corporate debts is by the statutes several, and not joint, and in the nature of a guaranty, and differs from the common-law obligation of a contract deemed to have been made by them: *Pratt v. Bacon*, 10 Pick. 127.

² *Conklin v. Furman*, 8 Abb. Pr., N. S., 164; *Hawthorne v. Calef*, 2 Wall. 22.

³ *Wright v. McCormack*, 17 Ohio St. 36; *Patterson v. Wyomissing Co.*, 40 Pa. St. 117; *Hoard v. Wilcox*, 47 Pa. St. 51; *Perry v. Turner*, 55 Mo. 418; *Hanson v. Donkersley*, 37 Mich. 184; *Malloy v. Mallett*, 6 Jones Eq. 345; *Andrew v. Vanderbilt*, 37 Hun, 468.

⁴ *Bush v. Cartwright*, 7 Or. 327.

⁵ *Simpson v. Reynolds*, 71 Mo. 594.

⁶ *Handy v. Draper*, 89 N. Y. 334.

⁷ *Potter v. Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428.

of the corporation, thus discharge his liability for more than the amount actually paid by him.¹ A judgment against a corporation is binding upon the stockholders till reversed, and is conclusive upon them in a subsequent suit against them by the same plaintiff.² It is competent evidence of the plaintiff's *status* as a creditor of the company and of the amount due him.³ A release by a creditor of a stockholder's liability for debt, by an instrument under seal, discharges the corporation and the other stockholders to the same extent as the one to whom the release is executed is discharged. Thus if the release be of the releasee's proportion of the indebtedness of the corporation, the corporation and other stockholders are only released *pro tanto*.⁴

ILLUSTRATIONS.—The assignees of an insolvent corporation which had surrendered its charter obtained a decree directing the payment of the assets in their hands, and they acted accordingly. One of the creditors, who had been paid the share awarded him by the decree, filed a bill against certain stockholders of the corporation for unpaid subscription of stock, claiming that the assignees had not collected said debts. *Held*, that he had no cause of action: *Branch v. Knapp*, 61 Ga. 614. Under a charter providing that "until thirty thousand dollars of the capital stock have been paid in, every stockholder shall be held individually liable for the debts of the company," *held*, that the stockholders were liable to be sued as partners, and not as guarantors. But the remedy of a creditor who was also a stockholder was in equity, and not at law: *Perkins v. Sanders*, 56 Miss. 733. Under a provision in an act of incorporation, "that the private property of the individual stockholders shall be liable for the debts, contracts, and liabilities of the corporation," *held*, that the responsibility on the individual stockholders is a secondary one, and that when the debts against the corporation became extinct by the expiration of its charter, the liability of the individual stockholders became extinct also: *Malloy v. Mallett*, 6 Jones Eq. 345. A promissory note signed with the name of a corporation by its treasurer, and indorsed with its name by its directors, was delivered to a person, under an agreement between him and the corporation, "that

¹ *Thompson v. Meisser*, 108 Ill. 359.

³ *Stephens v. Fox*, 83 N. Y. 313.

² *Milliken v. Whitehouse*, 49 Me. 527.

⁴ *Prince v. Lynch*, 38 Cal. 528; 90 Am. Dec. 427.

there should be no personal liability on the note." He afterwards recovered judgment against the corporation in an action at law upon the note. *Held*, on a bill in equity against the stockholders of the corporation, to enforce payment of the judgment, that it was meant that there should be no statutory liability on the part of the stockholders; and that this agreement was admissible in defense, and was not merged in the judgment: *Brown v. Eastern Slate Co.*, 134 Mass. 590.

§ 499. Personal Liability for Wages of Employees, Laborers, etc.—By statute in some states, stockholders are personally liable for wages due certain persons who have been employed by the defunct corporation, as, for example, laborers, servants, etc. In an action on a stockholders' liability, under the New York laws, for debts due laborers, the complaint must show that the debt was to have been paid within one year from the time it was contracted.¹ A provision that "all members," etc., "shall be personally liable for all debts contracted by the company for manual labor performed for the company," does not render a stockholder liable for debts of the company contracted before he became a member.² It is no ground of defense to one of the defendants that he, the stockholder, has paid some of the operatives other sums due them, and has a claim for contribution upon the other defendants.³ A traveling salesman is not a "laborer,"⁴ nor a secretary and book-keeper,⁵ nor an assistant chief engineer of a railroad,⁶ nor a contractor to prepare the road-bed of a railroad.⁷ A stockholder is not liable as for a labor debt for money due under a contract with the corporation, whereby the contractor is to carry on certain quarrying operations at his own expense and for a period of years, in a quarry owned by the corporation, and deliver rock to the corporation at certain rates.⁸ Under the

¹ *Dean v. Mace*, 19 Hun, 391.

² *Reeder v. Maranda*, 66 Ind. 485.

³ *Burnap v. Haskins Steam Engine Co.*, 127 Mass. 586.

⁴ *Jones v. Avery*, 50 Mich. 326.

⁵ *Viele v. Wells*, 9 Abb. N. C. 277.

⁶ *Brockway v. Innes*, 39 Mich. 47.

⁷ *Peck v. Miller*, 39 Mich. 594.

⁸ *Taylor v. Manwaring*, 48 Mich. 171.

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phrase "laborer, servant, operative, or apprentice," the following have been held not to fall, viz.: a book-keeper and general manager;¹ one employed to fill the place of a mining superintendent during his absence.² Under a statute which gives servants and employees of certain corporations a claim for wages against individual stockholders, in addition to the liability of the corporation, an employee does not, by taking a note of the corporation for such wages, and attempting to collect from the corporate assets, waive his rights against the individual stockholders. Nor can the stockholder, after the liability to the employee is incurred, avoid it, as a personal claim, by a transfer of his stock.³

ILLUSTRATIONS. — A mercantile firm delivered goods to the laborers of a mining corporation upon orders drawn in this form: "Due A for labor from the M. & P. Rolling Mill Co., \$, in goods, at the store of C. E., treasurer, by G."; and on delivery of goods to the amount so called for, the firm stamped each order "Paid." It was apparently understood that the firm should receive and honor the orders of the corporation, and that the latter should settle with it every month, and pay the amount of the orders taken by it. The firm became insolvent, and had among its assets a large number of these orders, on which suits were brought as for labor debts, and for the use of the persons to whom the orders were drawn, against one of the stockholders of the corporation. *Held*, that the actions would not lie; and that the use of the words "for labor," in the orders, was simply to indicate the nature of the service for which they were given, and not to keep them alive as against stockholders: *Beecher v. Dacey*, 45 Mich. 92. A was given a situation at a monthly salary of one thousand dollars a year, by a manufacturing corporation, on condition of his obtaining for the corporation a loan of three thousand dollars. A acted as foreman, helped to manufacture stone, kept time of the hands, solicited orders, and did whatever told to do by the superintendent. *Held*, that he was a laborer or servant within a statute making members of manufacturing corporations personally liable for the wages of laborers or servants: *Short v. Medberry*, 29 Hun, 39. A statute provided that the "stockholders of

¹ *Wakefield v. Fargo*, 90 N. Y. 213. and see *Krauser v. Ruckel*, 17 Hun, 463.

² *Dean v. De Wolf*, 16 Hun, 186; ³ *Jackson v. Meek*, Tenn., 1888.

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certain corporations shall only be liable for the amount of the stock subscribed by them respectively, provided, that such stockholders shall be individually liable for all debts due laborers, servants, apprentices, and employees for services rendered such corporation." *Held*, that a corporation aggregate could not be the "employee" of another corporation: *Dukes v. Love*, 97 Ind. 341.

§ 500. Rights of Bona Fide Holder of Shares Apparently Paid up.—In England, and in several of the courts of this country, it is held that a *bona fide* holder for value of shares which purport to be fully paid up is protected.¹ On the other hand, it is held in New York that the holder of stock which is not in fact paid up is liable to creditors of the corporation for the unpaid balance, whether a purchaser for value and without notice, or not.² Where he has been made the victim of fraud, he has his recourse against his vendor.³ Where it is claimed that the holder of nominally paid-up stock, purchased in the course of business, took it with notice that it was not paid up, the burden of proving notice is upon the plaintiff.⁴ A secret agreement entered into between the directors of a railroad corporation and a subscriber for shares in its capital stock, that he may, within a specified time, reduce the number of shares thus subscribed for, the subscription being held out as *bono fide* for the full amount, in order to induce others to subscribe, is void as a fraud on the other sub-

¹ *Steacy v. R. R. Co.*, 5 Dill. 348; *Sanger v. Upton*, 91 U. S. 60; *Brant v. Ehlen*, 59 Md. 1; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 493. In *Burkinshaw v. Nicolls*, L. R. 3 App. Cas. 1017, the chancellor said: "It would paralyze the whole of the dealings with shares in public companies, if a share being dealt with in the ordinary course of business, dealt with in the market with the representation upon it by the company that the whole amount of the share was paid, the person who took it was to be obliged to disregard the assertion of the company, and before he could obtain a title must

go and satisfy himself that the assertion was true, and that the money had been actually paid; . . . even if such a person were minded to make the investigation, he would be absolutely without the means of making it,—it would be impossible for him to obtain accurate information as to whether this state of things was true or not."

² *Boynton v. Andrews*, 63 N. Y. 93; but see *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

³ *Tasker v. Wallace*, 6 Daly, 364.

⁴ *Burkinshaw v. Nicolls*, L. R. 3 App. Cas. 1017.

scribers; and the original subscription may be enforced, for its full amount, between the corporation and the subscriber.¹ Where a stockholder of a manufacturing corporation, whose stock has not been fully paid in, in good faith makes an absolute and valid transfer of his stock to another, he is not liable for calls made after the transfer.²

ILLUSTRATIONS.—A transferred to B, for an old debt, shares of bank stock on which no payment had been made, although B supposed the shares to have been paid up. Afterwards A paid forty per cent upon the shares as calls were made, and B received dividends. The bank became insolvent, and a receiver was appointed, who sued B to recover the balance of A's subscription. *Held*, that the action could not be maintained: *Winttingham v. Rosenthal*, 25 Hun, 580.

§ 501. **Rights of Creditors—To Interfere in Management of Corporation.**—Creditors have no right to interfere in the management of a corporation, or the transfer of its assets, unless it be actually insolvent or in danger of insolvency.³

§ 502. **To Prevent Dissolution or Alteration in Charter.**—Creditors have no power to prevent a dissolution of a corporation,⁴ or an alteration in its charter.⁵

¹ *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124; *Downie v. White*, 12 Wis. 176.

² *Billings v. Robinson*, 94 N. Y. 415.

³ *Mills v. R. R. Co.*, L. R. 5 Ch. 621.

⁴ *Mumma v. Potomac Co.*, 8 Pet. 236; *Smith v. Canal Co.*, 14 Pet. 45; *Curran v. State*, 15 How. 310; *Mobile etc. R. R. Co. v. State*, 29 Ala. 573.

⁵ *Pennsylvania College Cases*, 13 Wall. 218.

CHAPTER XXVIII.

DISSOLUTION OF CORPORATIONS.

- § 503. Dissolution of corporation—By expiration of time or happening of contingency.
- § 504. By surrender of charter.
- § 505. Other cases.
- § 506. By forfeiture at suit of state for non-user or misuser of franchise.
- § 507. Effect of dissolution.
- § 508. Revivor of corporation.

§ 503. **Dissolution of Corporation—By Expiration of Time or Happening of Contingency.**—A corporation chartered to exist until a certain date ceases upon the expiration of that time.¹ So a corporation which is to exist until a certain contingency happens will expire upon the happening of that event. But there must first be a judicial determination of the fact.² If a franchise is granted by the legislature to construct a street railroad within a certain time, with a condition that if the provisions of the act are not complied with the franchise shall be forfeited, a failure to lay the track within the time limited works a forfeiture of the right to lay the same without a judgment at the suit of the state declaring a forfeiture, and the legislature may confer the franchise upon any other company or person.³ Where, for every practical purpose, a manufacturing corporation may be deemed to have been dissolved and its purpose abandoned before a given year, it need not file any report for that year.⁴

¹ *People v. Walker*, 17 N. Y. 502; *La Grange etc. R. R. Co. v. Rainey*, 7 Coldw. 432; *Bank v. Wrenn*, 3 Smedes & M. 791; *Bank v. Trimble*, 6 B. Mon. 601.

² *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *La Grange etc. R. R. Co. v. Rainey*, 7 Coldw. 432; *Flint etc. R. R. Co. v. Wood-*

hull, 25 Mich. 99; 12 Am. Rep. 233; *Ormsby v. Vermont Mining Co.*, 65 Barb. 360; *Moseby v. Burrow*, 52 Tex. 396.

³ *Oakland R. R. Co. v. R. R. Co.*, 45 Cal. 365; 13 Am. Rep. 181. But see *contra*, *Day v. R. R. Co.*, 107 N. Y. 129.

⁴ *Bruce v. Platt*, 80 N. Y. 379.

ILLUSTRATIONS.—The charter of a private corporation invested it with "perpetual succession." *Held*, to mean that it was invested with the right to exist forever: *Fairchild v. Masonic Hall Assoc.*, 71 Mo. 526; *contra*, *Scanlan v. Cranshaw*, 5 Mo. App. 337. A corporation is chartered to construct a canal, to be completed within a given time. The failure to finish the work within that time does not dissolve it: *McIntire v. Zanesville Co.*, 9 Ohio, 203; 34 Am. Dec. 435. In an action to recover tolls by a corporation chartered to erect a bridge, and to take tolls thereon for twenty years, *held*, that although the forfeiture of a corporate franchise could only be taken advantage of by the state, the defendant might show that the twenty years had expired, and thereby defeat the action: *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400; 24 Am. Rep. 585. The corporation act of Oregon declares that if any corporation shall neglect and cease to carry on its business for any period of six months, its corporate powers shall cease. *Held*, that such neglect did not terminate the existence of the corporation as by lapse of time, but that it was a cause of forfeiture of the corporate privileges, of which no one but the state could complain or take advantage: *Wallamet Falls etc. v. Kittridge*, 5 Saw. 44.

§ 504. **By Surrender of Charter.**—A corporation becomes dissolved by surrendering its charter to the state,¹ provided the state accepts the surrender;² for in order to make a surrender of a corporate charter effectual, it is necessary that it be accepted by the government, and that a record thereof be made.³ It does not require a unanimous vote to surrender the franchises of a corporation; it may be done by a majority.⁴ A great distinction exists between public and private corporations. Railroad, canal, turnpike, charitable, religious, and other corporations established for objects *quasi* public cannot sur-

¹ Morawetz on Corporations, sec. 637; *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *McMahan v. Morrison*, 16 Ind. 172; 79 Am. Dec. 418.

² *Enfield Toll Bridge Co. v. R. R. Co.*, 7 Conn. 45; *Revere v. Boston Copper Co.*, 15 Pick. 351; *Town v. Bank of River Raisin*, 2 Doug. (Mich.) 530, 538; *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 420; *Wilson v. Prop. etc.*, 9 R. I. 590; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 268; *Ward*

v. Sea. Ins. Co., 7 Paige, 294; *Boston Glass Co. v. Langdon*, 24 Pick. 49; *Norris v. Mayor etc. of Smithville*, 1 Swan, 164; *Curien v. Santini*, 16 La. Ann. 27.

³ *Norris v. Mayor etc. of Smithville*, 1 Swan, 164.

⁴ *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 490; *Zabriskie v. R. R. Co.*, 18 N. J. Eq. 193.

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render or dispose of their franchises without the consent of the state.¹ On the other hand, mere private corporation, or a trading corporation which is formed solely for the pecuniary benefit of its share-holders, may wind up its business by the sale of its assets, whenever the majority, in the exercise of sound discretion, deem this course to be expedient.² And this may be done by a majority of the stockholders, even against the wishes of a minority.³

But the sale must be made with the *bona fide* object of winding up the corporation.⁴ The minority are entitled to an immediate distribution of the proceeds of the sale,⁵ and they may elect in what form they will receive their proportion of assets,—whether they will take the specific property into which the corporate assets have been transferred, or insist upon cash in lieu of the same.⁶ The

¹ *Treadwell v. Manufacturing Co.*, 7 Gray, 393; 66 Am. Dec. 490; *Johnson v. R. R. Co.*, 3 De Gex, M. & G. 914; *Shrewsbury etc. R. R. Co. v. R. R. Co.*, 6 H. L. Cas. 113; *Macgregor v. R. R. Co.*, 18 Q. B. 618; *Thomas v. R. R. Co.*, 101 U. S. 71, 83; *York & Md. R. R. Co. v. Winans*, 17 How. 30, 39; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 130, 399; *Commonwealth v. Smith*, 10 Allen, 448, 455; *Lauman v. R. R. Co.*, 30 Pa. St. 42; 72 Am. Dec. 685; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581, 601; *American Union Tel. Co. v. R. R. Co.*, 1 McCrary, 188; *Richardson v. Sibley*, 11 Allen, 66; *Lyon v. Jerome*, 26 Wend. 485.

² *Merchants' etc. Line v. Waganer*, 71 Ala. 581; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 490; *Wilson v. Props of Central Bridge*, 9 R. I. 590; *McCurdy v. Myers*, 44 Pa. St. 535; *Curran v. State of Arkansas*, 15 How. 304, 310; *Ward v. Soc. of Attys*, 1 Coll. 370; *Bank of Switzerland v. Bank of Turkey*, 5 L. T., N. S., 649; *Riddle v. Prop. of Locks etc.*, 7 Mass. 185; *Hampshire v. Franklin*, 16 Mass. 86; *Savage v. Walshe*, 26 Ala. 619; *Mumma v. Potomac Co.*, 8 Pet. 681; *Penobscot Boom Co. v. Lamson*, 16 Me. 224; *Enfield Toll Bridge Co. v. Conn. etc. Riv. Co.*, 7 Conn. 29; *Com-*

monwealth v. Slifer, 53 Pa. St. 71; *Reveres v. Copper Co.*, 15 Pick. 351; *Lauman v. R. R. Co.*, 30 Pa. St. 42; 72 Am. Dec. 685; *Hancock v. Holbrook*, 4 Woods, 52; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 414, 415.

³ *Black v. Del. etc. Canal Co.*, 22 N. J. Eq. 130, the court saying: "Becoming incorporated for a specific object, without any specified time for the continuance of the business, is no contract to continue it forever any more than articles of partnership without stipulations as to time. There is no reason why it should be construed into such a contract; such is not implied in the charter, and a doctrine that all the share-holders but one may be compelled to continue a business which they find undesirable, and wish to abandon, is so unreasonable and unjust that it will not be held to arise by implication, unless that implication is a necessary one."

⁴ *Morawetz on Corporations*, sec. 212.

⁵ *McVicker v. Ross*, 55 Barb. 247; *Frothingham v. Barney*, 6 Hun, 366; *Taylor v. Earle*, 8 Hun, 1.

⁶ *Lauman v. R. R. Co.*, 30 Pa. St. 42; 72 Am. Dec. 685; *N. O. etc. R. R. Co. v. Harris*, 27 Miss. 517; *Black v. Del. & Rar. Canal Co.*, 22 N. J. Eq.

minority cannot be compelled to take an annuity instead of their proportion of assets, or the proceeds from the sale of the same.¹ Nor are they obliged to take stock in another company, unless that stock has a fixed money value, and is easily convertible into cash; but the dissentients cannot prevent the exchange of assets for stock, provided those who favor this transaction make provision for payment of cash to those who prefer it.² And it is the duty of the majority to wind up the corporation, by the sale of its assets, upon such terms as shall be most advantageous.³ A surrender of a charter by a corporation may be presumed from a neglect for a long time to choose corporations, and to exercise the corporate franchises.⁴

§ 505. **Other Cases.**—A corporation does not become dissolved merely by neglecting to appoint agents, or to carry on its business.⁵ Neither does insolvency work a dissolution.⁶ Neglect by a corporation to hold meetings for ten years is not, in itself, ground for a dissolution;⁷ nor omitting to elect officers;⁸ nor does a sale of its property and cessation of active business.⁹ A corporation created by the legislature for the purposes of local municipi-

130; *McCurdy v. Myers*, 44 Pa. St. 535; *Frothingham v. Barney*, 6 Hun, 366; *Middlesex R. R. Co. v. R. R. Co.*, 115 Mass. 351.

¹ *Morawetz on Corporations*, sec. 213.

² *Clearwater v. Meredith*, 1 Wall. 25; *Ex parte Bagshaw*, L. R. 4 Eq. 341; *McCurdy v. Myers*, 44 Pa. St. 535; *State v. Bailey*, 16 Ind. 51; *Hodges v. New England Screw Co.*, 1 R. I. 347; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 490.

³ *Cramer v. Bird*, L. R. 6 Eq. 143; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737, 750; *Pratt v. Jewett*, 9 Gray, 34; *Salem Mill Corp. v. Ropes*, 6 Pick. 23; *Lafond v. Deems*, 81 N. Y. 507; *Denike v. N. Y. etc. Lime Co.*, 80 N. Y. 599; *Bliven v. Peru Steel Co.*, 60 How. Pr. 280; *De Witt v. Hastings*, 69 N. Y. 518.

⁴ *State v. Vincennes University*, 5 Ind. 77; *State v. Bull*, 16 Conn. 179.

⁵ *Morawetz on Corporations*, sec. 635; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9; 26 Am. Dec. 111; *St. Louis etc. Ass. v. Augustin*, 2 Mo. App. 123. The old officers hold over: *St. Louis etc. Ass. v. Augustin*, 2 Mo. App. 123.

⁶ *Coburn v. Papier Maché Co.*, 10 Gray, 245; *Dewey v. St. Albans Trust Co.*, 56 Vt. 476; 48 Am. Rep. 803; *Nimmons v. Tappan*, 2 Sweeney, 652; *Moran v. Lydecker*, 27 Hun, 582.

⁷ *State v. Barron*, 58 N. H. 370.

⁸ *Boston Glass Co. v. Langdon*, 24 Pick. 49; 35 Am. Dec. 294; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124; 43 Am. Dec. 456.

⁹ *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Reichwald v. Com. Hotel Co.*, 106 Ill. 439.

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pal government cannot, without a provision to that effect, be dissolved by the mere failure to elect officers. The inhabitants of the designated locality are the incorporators, and the officers are their mere servants or agents.¹ In a Pennsylvania case it is said that a corporation is not necessarily dissolved by insolvency, assignment for the benefit of creditors, or writ of sequestration. If it keeps up its organization, it still exists, and its franchises and powers not capable of assignment must be exercised by it in subserviency to its legal and equitable obligations.² The fact that a manufacturing corporation has temporarily leased its property to some person to continue and carry on its business does not give a portion of its stockholders a standing in a court of equity to ask for a dissolution of the corporation.³ A private corporation does not become dormant, or forfeit its franchises, because a single individual becomes, by purchase of the stock, sole owner of the corporate property and franchises. And if such sole owner continues the business under the corporate name, without notice to the public, he may be sued as such corporation.⁴ The use of an abbreviation of its corporate name by a corporation is not a usurpation, and will not support a proceeding by *quo warranto* to oust it from the enjoyment of its franchise.⁵ A court of equity has no jurisdiction to restrain a navigation company from collecting tolls on the streams to which its charter refers, on the ground that it had failed to improve the streams as its charter prescribed, or to keep them in order.⁶ But it has been held that where a manufacturing company ceases to do business, having expended all its resources and become bankrupt, this works a dissolution.⁷ So it may be dis-

¹ Welch v. Steamer Genevieve, 1 Dill. 136.

² Germantown R. R. Co. v. Fitler, 60 Pa. St. 124; 100 Am. Dec. 546.

³ Denike v. New York and Rosendale Lime and Cement Co., 80 N. Y. 599.

⁴ Newton etc. Co. v. White, 42 Ga. 148.

⁵ People v. Bogart, 45 Cal. 73.

⁶ Pixley v. Roanoke Nav. Co., 75 Va. 320.

⁷ Briggs v. Penniman, 8 Cow. 387; 18 Am. Dec. 455.

solved by the death of all its members.¹ The sale by a railroad corporation of its road, although the corporation still retains important franchises pertaining to its land grants, is ground for the forfeiture of its charter.²

ILLUSTRATIONS.—The trustees of a mutual benefit association illegally voted themselves back pay, and issued unauthorized certificates of membership. *Held*, not sufficient ground for ousting the association of its franchise: *State v. People's Mut. Benefit Assoc.*, 42 Ohio St. 579. A corporation, formed under the act relative to corporations for manufacturing purposes, had become utterly insolvent, and had ceased to manufacture, or to act as a corporation in any respect. *Held*, that the corporation was dissolved so far as to give to the creditors of the corporation a remedy against the stockholders, under the statute: *Penniman v. Briggs*, Hopk. 300. But see *Penniman v. Briggs*, 8 Cow. 387; 18 Am. Dec. 455. A stockholder in a corporation brought suit to obtain a judgment dissolving it, on the statutory ground that it had suspended its business for a year. After it had begun business its patents were attacked by a rival company, and pending the litigation, an agreement was made for a division of profits when the litigation should be terminated, and the two companies were consolidated by agreement. The organization was kept up, royalties were received, licenses issued, and suits prosecuted and defended. *Held*, that grounds for a dissolution were not shown, and that if the arrangement for consolidation, etc., was unauthorized, the action should be brought by the attorney-general, and not by the stockholder: *Kelsey v. Pfaudler Process Fermentation Co.*, 45 Hun, 10; 19 Abb. N. C. 427.

§ 506. Dissolution by Forfeiture for Misuser or Non-user of Franchises.—Misuser or non-user of its franchises may dissolve the corporation by a judgment of forfeiture at the suit of the state.³ For non-user or misuser, courts

¹ *McIntire v. Zanesville Co.*, 9 Ohio, 203; 34 Am. Dec. 436.

² *State v. R. R. Co.*, 36 Minn. 246.

³ *Terrett v. Taylor*, 9 Cranch, 51; *People v. Turnpike Co.*, 23 Wend. 193; 35 Am. Dec. 551; *Atty-Gen. v. R. R. Co.*, 6 Ired. 456; *People v. Utica Ins. Co.*, 15 Johns. 358; *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *State Bank v. State*, 1 Blackf. 267; 12 Am. Dec. 234; *John v. Farmers' etc. Bank*, 2 Blackf. 367; 20 Am.

Dec. 119; *Boston Glass Co. v. Langdon*, 24 Pick. 49; 35 Am. Dec. 292; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 43 Am. Dec. 719; *State v. Commercial Bank*, 13 Smedes & M. 569; 53 Am. Dec. 106; *Paschall v. Whitsett*, 11 Ala. 472; *Mumma v. Potomac Co.*, 8 Pet. 281; *Com. v. Blue Hill Tp. Co.*, 5 Mass. 423; *Com. v. Union etc. Ins. Co.*, 5 Mass. 230; *Folger v. Columbian Ins. Co.*, 99

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cannot judicially declare forfeited the charters of public corporations.¹ A corporation's franchises continue in full force until a forfeiture is claimed by the state granting them.² The mere judgment of forfeiture does not, of itself, work a dissolution of the corporation. There must first be an execution for the seizure of the franchises, before the penalties of forfeiture take place.³ The attorney-general may not be compelled by *mandamus* to institute a suit for the forfeiture of the charter of a corporation.⁴ A claim of the forfeiture of the franchise cannot be raised collaterally, but only in a direct proceeding instituted for the purpose.⁵ An information in equity, by the attorney-general, cannot be maintained against a private trading corporation, where the acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation, and where the only objection to them is, that they are not authorized by its act of incorporation, and are, therefore, against public policy.⁶ The "reasonable cause to decree a dissolution," within the Massachusetts statutes, imports more than a mere vague apprehension of some future mischief. So where one telegraph company had made a fraudulent lease of its line to another, but after the filing of the petition for dissolution the lease was canceled by vote of the directors of both companies, it was held that no ground

Mass. 267; 96 Am. Dec. 747; Board of Education v. Bakewell, 122 Ill. 339. Repeated and willful acts of misuser or non-user by a corporation, which are of the essence of the contract between it and the state, constitute a just ground of forfeiture of the franchise: State v. Council Bluffs and Nebraska Ferry Co., 11 Neb. 354. Equity has not jurisdiction to declare corporate franchises forfeited: Society v. Morris Canal Co., 1 N. J. Eq. 157; 21 Am. Dec. 41; Atty.-Gen. v. Stevens, 1 N. J. Eq. 369; 22 Am. Dec. 526.

¹ Welch v. Str. Genevieve, 1 Dill. 130.

² Moore v. Schoppert, 22 W. Va. 282.

³ Nevitt v. Bank of Port Gibson, 14 Miss. 513. The fact that a corporation has, by non-performance of a condition of its charter, forfeited its corporate rights and powers, may be asserted by any one whose land or property is sought to be appropriated, in answer to the application therefor: In re Brooklyn etc. R. R. Co., 72 N. Y. 245.

⁴ State v. Attorney-General, 30 La. Ann. pt. 2, 954.

⁵ Toledo etc. R. R. Co. v. Johnson, 49 Mich. 148.

⁶ Attorney-General v. Tudor Ice Co., 104 Mass. 239; 6 Am. Rep. 227.

for a decree of dissolution remained.¹ It is not every excess of power, nor every omission of duty, that produces the effect of forfeiting a charter. The public must have an interest in the act done; or omitted to be done. If it is confined to the corporation, and in no wise affects the community, it should not be considered as of those conditions upon which the grant is made. In order to a forfeiture, there must be something wrong done, arising from willful abuse or improper neglect; there must be a plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization. The acts of misuser or non-user must be touching matters which are of the essence of the contract between the sovereign and the corporation.² Not every failure of a corporation to perform a duty imposed by its charter will work a forfeiture thereof. It must be something more than accidental negligence, or excess of power, or mere mistake in the mode of exercising an acknowledged power; and though a single act of willful non-feasance may be a ground of forfeiture, a specific act of non-feasance, not committed willfully, and not producing or intending to produce mischievous consequences to any one, and not being contrary to particular requisitions of the charter, will not be.³ Where a charter provides that "if the corporation shall at any time misuse or abuse" its franchises, the legislature may revoke the grant, the power of revocation is thereby made conditional upon the fact of some misuse or abuse, and this fact must be proved upon some inquiry, giving the corporation an opportunity to be heard in defense, before the charter can be revoked.⁴ Where a corporation has abused its corporate powers, but not in any particular as to which it is declared by statute, the act shall operate as a forfeiture of

¹ In re Franklin Tel. Co., 119 Mass. 447.

² Harris v. R. R. Co., 51 Miss. 602.

³ State v. Pawtuxet Turnp. Co., 8 R. I. 182.

⁴ Baltimore v. R. R. Co., 1 Abb. C. C. 9.

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its charter; the court is vested with a discretion to determine whether the corporation shall be ousted of its franchise to be a corporation, or of the exercise of the powers illegally assumed.¹ Failure of the corporators to organize under the charter is not such a non-user as will warrant an action of *quo warranto* to vacate the charter.² A sale and conveyance by an incorporated turnpike company of a portion of its road to a municipal corporation, and neglect thereafter to repair that portion, is a willful, deliberate act, violative of its plain duty, which warrants a judicial decree of forfeiture of its charter.³ Proceedings may be had for the dissolution of a corporation neglecting for a year to pay its debts, and may be initiated by a stockholder, where the corporation is organized under the general manufacturing laws.⁴ The question whether a franchise has been abandoned is one of intention; and such intention, to constitute an abandonment, must be clearly indicated by facts or circumstances. Non-user, even for twenty years, although a fact which may be used in determining the question, is not *per se* conclusive evidence of abandonment.⁵ The legislature may waive a forfeiture.⁶ A waiver will take place where the legislature declares that the corporation shall continue, or where it authorizes the defunct corporation to perform corporate acts.⁷ The forfeiture is not waived by the appointment by the governor of the state of a state director on the board.⁸

ILLUSTRATIONS.—A corporation organized for the promotion of education, after carrying out the purposes of its charter for a time, transferred its property and remained inactive for nine-

¹ State v. Oberlin Building and Loan Assoc., 35 Ohio St. 258.

² State v. Simonton, 78 N. C. 57.

³ State v. Pawtuxet Turnp. Co., 8 R. I. 182; 8 R. I. 521.

⁴ Kittredge v. Kellogg Bridge Co., 8 Abb. N. C. 168.

⁵ Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463.

⁶ Milford v. Brush, 10 Ohio, 111; 36 Am. Dec. 78.

⁷ State v. Bank of Charleston, 2 McMull. 439; 39 Am. Dec. 135; State v. Turnpike, 15 N. H. 162; 41 Am. Dec. 690; State v. R. R., 20 Ark. 495; People v. Manhattan Co., 9 Wend. 351.

⁸ People v. Phoenix Bank, 24 Wend. 431; 35 Am. Dec. 634.

teen years. *Held*, that *quo warranto* for a dissolution would lie, and this, notwithstanding the pendency of a suit to recover some of the land formerly owned by it, but sold nineteen years before: *State v. Pipher*, 28 Kan. 127. An incorporated turnpike company in good faith attempted to consolidate with another one. Twelve years afterwards the consolidation was declared void. The company then resumed possession of its property, and for a year continued to exercise its franchises. *Held*, that it should not be deemed to have forfeited them: *State v. Crawfordville and Shannondale Turnpike Co.*, 102 Ind. 283. The charter of a turnpike corporation provided that at the end of every six years after the setting up of any toll-gate, an account of the expenditures and profits of the road should be laid before the legislature, "under forfeiture of the privileges of the act in future." Toll-gates were erected in the year 1806. No account was laid before the legislature until the year 1830, but in that year, and in the years 1836 and 1842, accounts were submitted, which were received by the legislature as "sufficient and satisfactory," and in the year 1833 an act was passed authorizing the corporation to change the route of the road in certain places. *Held*, that such acts amounted to a waiver of the forfeiture: *State v. Fourth N. H. Turnpike*, 15 N. H. 162.

§ 507. **Effect of Dissolution.**—At common law, the effect of a dissolution of a corporation was, that the real estate reverted to the grantor and his heirs, its goods and chattels went to the crown, and the debts due to and from it became extinguished.¹ But this harsh rule is now obsolete, and the courts of equity, on the dissolution of a corporation, will take charge of its assets, and apply them first to the payment of creditors, and then to distribution among the share-holders.² The forfeiture of a charter

¹ *State Bank v. State*, 1 Blackf. 267; 12 Am. Dec. 234; *Fox v. Horah*, 1 Ired. Eq. 358; 30 Am. Dec. 48; *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168. In Maine, upon the dissolution of a mutual insurance company, its personal property, after payment of legal liabilities, vests in the state: *Titcomb v. Kennebunk Mut. F. Ins. Co.*, 79 Me. 315.

² *Bacon v. Robertson*, 18 How. 480; *Curran v. State*, 15 How. 312; *Lum v. Robertson*, 6 Wall. 277; *City Ins. Co. v. Com. Bank*, 68 Ill. 348; *Muscatine*

v. Funk, 18 Iowa, 469; *Tinkham v. Borst*, 31 Barb. 407; *Hastings v. Drew*, 50 How. Pr. 254; *Crease v. Babcock*, 23 Pick. 334; 34 Am. Dec. 61; *Folger v. Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747. The rule of the common law, that real estate held by a corporation at the time of its dissolution reverts to the grantor, does not prevail in this state in respect to stock corporations. Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor: *Heath v. Bar-*

would lie, to recover fifteen years and turnpike with another as declared as property, *Held*, that *State v. Crawford*, 283. The end of an account laid before the act in No account but in that submitted, and satisfactorily authorizing certain places. forfeiture:

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; *Tinkham v. Hastings v. Drew*, *see v. Babcock*, sec. 61; *Folger*; 96 Am. Dec. common law, a corporation lution reverts prevail in this corporations. ved absolutely stockholders, y of a reverter *Heath v. Bar-*

dates from the commission of the act which causes the forfeiture, but the corporation continues in existence *de facto* until judgment of forfeiture is pronounced.¹ The dissolution of a corporation changes the character of the property of its stockholders; it destroys their stock, and substitutes the thing which their stock represented; that is, a legal interest in the corporate property.² In a very

more, 50 N. Y. 302. In *Bacon v. Robertson*, *supra*, the court said: "The effects of a dissolution of a corporation are usually described to be the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporated body, so that they are not a charge nor a benefit to the members. The instances which support the *dictum* in reference to the lands consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object; nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the corporation is literally taken, there can be no objection to it. The members cannot recover, nor be charged with them, in their natural capacities, in a court of law. But this does not solve the difficulty. The question is, Has the *bona fide* and just creditor of a corporation dissolved under a judicial sentence, for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the legislature which di-

rected the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment of their price, and executed an absolute conveyance? Can the careless, improvident, or faithless debtor plead the extinction of his debt, or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless, — he has not participated in the corporate mismanagement, nor procured the judicial sentence; he has trusted upon visible property acquired by the corporation, in virtue of its legislative sanction. How can the vendors of the land or the delinquent debtors resist the might of his equity? But if the claims of the creditor are irresistible, those of the stockholder are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debt, lands, and personalty acquired by the corporation were purchased with the capital they lawfully contributed to a legitimate enterprise, conducted under the legislative authority. The enterprise has failed, under circumstances, it may well be, which entitle the state to withdraw its special support and encouragement; but the state does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well-settled principles, would aid the parties to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it."

¹ *State v. Bank of Charleston*, 2 McCull. 439; 39 Am. Dec. 135.

² *Lauman v. R. R. Co.*, 30 Pa. St. 42; 72 Am. Dec. 685.

recent case in New York, it is held that the dissolution of a corporation neither destroys its property nor annuls its contracts; they stand in the same position as those of a natural person on his death. The reservation in a charter of a right to repeal it, allows the state to destroy its corporate life, and prevent it from continuing its corporate business; but personal and real property acquired by it during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their general nature depend upon the powers conferred by the charter, are not destroyed by such repeal. A franchise to construct and maintain a street-railway survives the dissolution of the corporation grantee, resulting from the repeal of its charter enacted pursuant to a right of repeal reserved by the legislature. Upon the repeal of an act of incorporation, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees.¹

After dissolution the corporation cannot sue.² It cannot be made a party to a suit by the receiver,³ and no legal judgment can be rendered against it.⁴ If the corporation

¹ *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684.

² *Bank v. Wilson*, 19 La. Ann. 1; *Miami Ex. Co. v. Gano*, 13 Ohio, 269.

³ *Carey v. Gilos*, 16 Ga. 9. After the charter of a corporation is declared forfeited, it can do no act by which rights can be acquired, nor can it maintain a suit to enforce those acquired during the continuance of the charter, unless its power and capacity for that purpose is continued by statute after its existence as a corporation is ended: *Saltmarsh v. Planters' and Merchants' Bank*, 17 Ala. 761; *S. P., Greeley v. Smith*, 3 Story, 657. Before the expiration of the charter of a

corporation, the legislature may provide that, after it has expired, actions may, within a limited time, be commenced in its name for the benefit of the stockholders; and the power to commence actions within that time gives the power to prosecute them to final judgment: *Franklin Bank v. Cooper*, 36 Me. 179.

⁴ *Merrill v. Suffolk Bank*, 31 Me. 57; 50 Am. Dec. 649; *Folger v. Ins. Co.*, 99 Mass. 276; *Bonaffe v. Fowler*, 7 Paige, 576; *Farmers' Bank v. Little*, 8 Watts & S. 207; *Dobson v. Simon-ton*, 86 N. C. 492. The proper remedy against an insolvent corporation, when its assets are of such a nature

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expires before judgment, no execution can be issued in its name;¹ nor will a writ of error lie.² Where the charter expires by lapse of time during the pendency of an appeal in a suit against the corporation, the appeal abates.³ A corporation cannot dissolve itself by mere corporate act or vote of a majority of its members, so as to escape its responsibilities or liabilities.⁴ No repeal of the charter of a corporation can take away or impair the remedy of a creditor against it for previously incurred liability.⁵ A lease to a corporation is not terminated by the dissolution of the corporation, and a receiver will be required to pay rent due under the lease.⁶ A stockholder of a defunct corporation has such an interest as entitles him to defend a suit brought to foreclose a mortgage alleged to have been executed by the corporation when alive.⁷ On the dissolution of a corporation, its stockholders may authorize the sale of its property, and prescribe the manner in which such sale shall be made.⁸

ILLUSTRATIONS.—A volunteer fire company was chartered by the legislature, and its officers were commissioned by the governor. It had no stock or subscription, and could acquire no property except by donation. The only compensation of its members was relief from militia and jury duty. *Held*, that the heirs of a deceased member had no interest in its property on its dissolution: *Mason v. Atlanta Fire Co.*, 70 Ga. 604; 48 Am. Rep. 585. In an act of incorporation it was provided that the same should be void unless a certain sum of money was paid in as part of the capital stock of the corporation within two years from its passage. *Held*, that after five years had elapsed from the expiration of that period, it was too late to institute

that they cannot be levied upon and sold under execution, is a bill in equity to marshal and distribute its assets: *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301.

¹ *May v. State Bank*, 2 Rob. (Va.) 57.
² 40 Am. Dec. 728.
³ *Renick v. Bank*, 13 Ohio, 298; 42 Am. Dec. 203.

⁴ *Rider v. Nelson Factory*, 7 Leigh, 154; 30 Am. Dec. 495.

⁵ *Portland Dry Dock etc. Co. v.*

Portland, 12 B. Mon. 77; *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53; *Curien v. Santini*, 16 La. Ann. 27; *Revere v. Boston Copper Co.*, 15 Pick. 351; *Town v. Bank of River Raisin*, 2 Doug. 530.

⁶ *Blake v. R. R. Co.*, 39 N. H. 435.
⁷ *People v. National Trust Co.*, 82 N. Y. 283.

⁸ *Chouteau v. Allen*, 70 Mo. 290.

⁹ *Moore v. Willamette Transp. etc. Co.*, 7 Or. 359.

proceedings to obtain a forfeiture on account of omission to comply with such provision. The court will lay down no universal rule in such cases, but will decide whether the delay has been unreasonable or not from the circumstances of each case: *People v. Oakland County Bank*, 1 Doug. 282. A Missouri corporation having real estate in Illinois was sued in the latter state, and the real estate attached. Afterwards the corporation was dissolved, and its affairs put into the hands of a receiver in Missouri. *Held*, that the suit would not thereby be defeated, especially as the decree dissolving the corporation provided that suits might be brought and defended in the name of the corporation: *Life Ass'n of America v. Fassett*, 102 Ill. 315. A corporation went into liquidation, and transferred all its property to another corporation. A was injured afterwards by a vessel thus transferred, and his administrator sued the old corporation and recovered judgment. *Held*, that the judgment could not be enforced in equity against the property of the new corporation: *Gray v. National S. S. Co.*, 115 U. S. 116. An insurance company is dissolved by decree of court. *Held*, that all contracts of insurance are thereby terminated: *Carr v. Union Mut. Ins. Co.*, 28 Mo. App. 215. A ferry is maintained as an incident to a chartered turnpike to facilitate travel over it. *Held*, that the forfeiture of the turnpike franchise forfeits the privilege of maintaining the ferry: *Darnell v. State*, 48 Ark. 321.

§ 508. Revivor of Corporation.—A corporation whose charter has expired may be revived by the legislature.¹

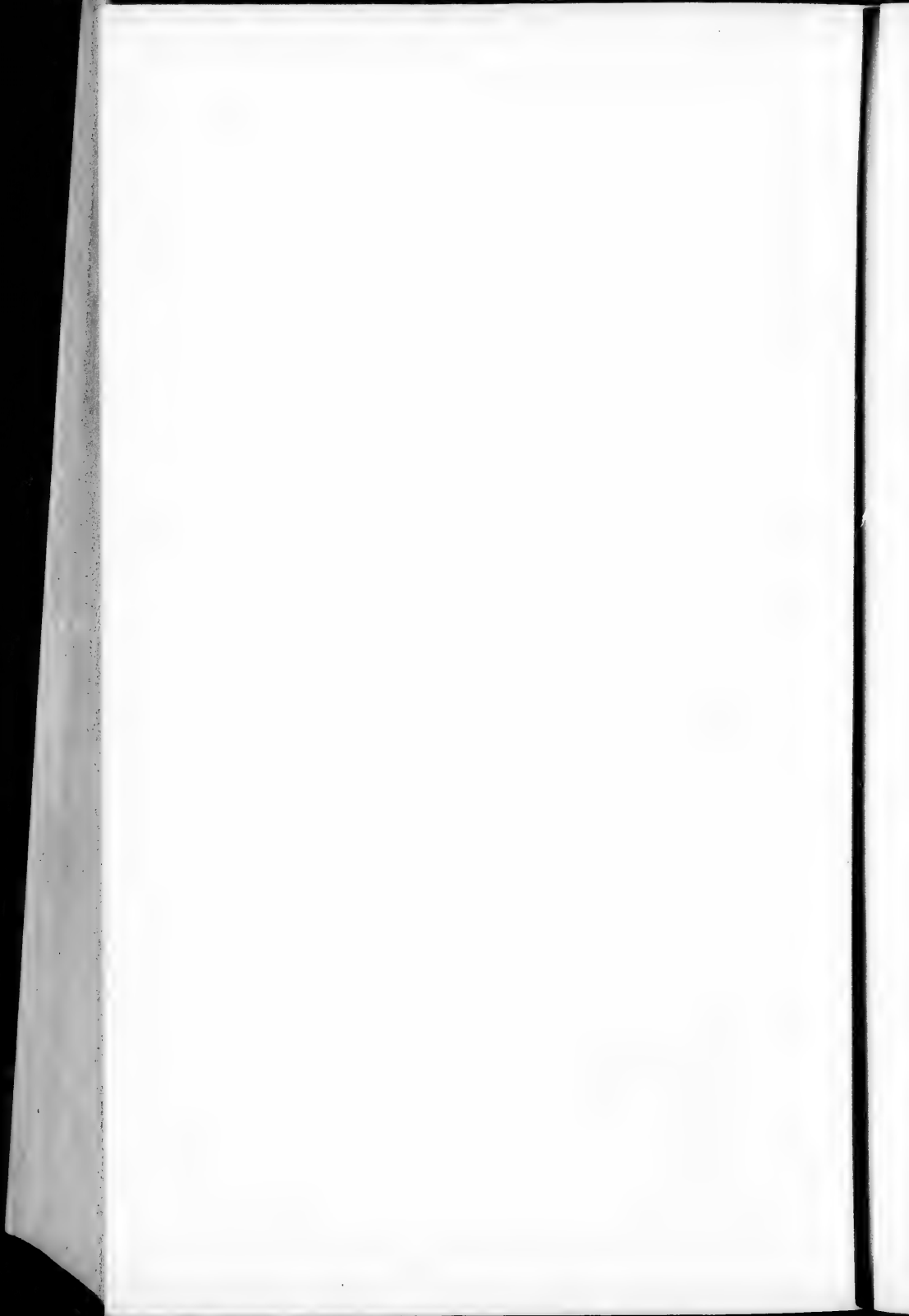
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